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LINK FUND SOLUTIONS LIMITED v THE COMPANIES ACT 2006

Day 1AH1

October 10, 2023

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1		1	wish to address you today. We are also aware of two other
2	Tuesday, 10 October 2023	2	Scheme Creditors $-$ I think may be appearing remotely unless
3	(10.30 a.m.)	3	they are in court. Mr Chris Allan and Mr Graham Dickenson.
4		4	As I say, both of those are Scheme Creditors and both have
5	DISCUSSION re Housekeeping	5	said that they wish to address the court but do not
6	MRS JUSTICE BACON: Yes, Ms Toube.	6	MRS JUSTICE BACON: Can I just get their names?
7	MS TOUBE: Good morning, my Lady.	7	MS TOUBE: Yes. Mr Chris Allan, A-L-L-A-N.
8	MRS JUSTICE BACON: Is it a Miss or Ms or something	8	MRS JUSTICE BACON: Yes.
9	else?	9	MS TOUBE: And Mr Graham Dickenson, that is
10	MS TOUBE: Ms is fine, thank you.	10	D-I-C-K-E-N-S-O-N.
11	MRS JUSTICE BACON: Ms, great.	11	MRS JUSTICE BACON: And should I have had written
12	MS TOUBE: As your Ladyship knows, I appear together	12	submissions from them?
13	with Ms Beltrami for the Scheme company LFSL. Mr Al-Attar,	13	MS TOUBE: No, there are no written submissions from
14	who is my other junior, is unable to attend this morning.	14	any of those parties .
15	Mr Smith KC and Mr Haywood appear for the FCA. Ms Cooke,	15	MRS JUSTICE BACON: All right.
16	who is on the far right, appears for the Investor Advocate,	16	MS TOUBE: So they are all appearing without counsel,
17	who is behind her. Mr Bompas KC and Mr Crossley appear for	17	and as far as I know Mr Allan and Mr Dickenson are appearing
18	a set of opposing creditors, as your Ladyship will have	18	remotely, whereas Mr Pyatt, as I say, is here in court.
19	seen, represented by Harcus Parker and Leigh Day.	19	MRS JUSTICE BACON: All right. So, we will have
20	MR BOMPAS: Sorry, my Lady, there is a point that comes	20	submissions from them in due course. Has there been any
21	straight on from that. My learned friend, in her skeleton	21	agreement as to the division of time? Because we have only
22	argument, made an assertion that we are opposing the Scheme.	22	got a day set aside for this.
23	We are not. What we are opposing is the———	23	MS TOUBE: There has not, except we are all aware that
23 24	•	24	• •
25	MRS JUSTICE BACON: Class composition.	25	we need to get through this as quickly as possible and as
23	MR BOMPAS: Composition of class.	23	efficiently as possible. Although there are a lot of us
	1		3
1	MRS JUSTICE BACON: Yes.	1	here, the actual points before your Ladyship this morning
2	MS TOUBE: Your Ladyship should have skeletons from all	2	were relatively limited.
3	the counsel in as much as I———	3	MRS JUSTICE BACON: Yes, the main point is the class
4	MRS JUSTICE BACON: Can whoever it is who is not muted	4	composition.
5	mute themselves, please? Everybody who is not in the	5	MS TOUBE: It is. There are also issues about various
6	courtroom and is dialling remotely should be muted and with	6	drafting points.
7	camera turned off. No exceptions, please. All right,	7	MRS JUSTICE BACON: And notification. I think there is
8	sorry. Sorry, Ms Toube. You have run through the list of	8	an issue raised by Mr Pyatt.
9	counsel.	9	MS TOUBE: Yes, we will come back to that.
10	MS TOUBE: Yes.	10	MRS JUSTICE BACON: All right.
11	MRS JUSTICE BACON: But am I also getting submissions	11	MS TOUBE: We have got updated versions of various
12	from any of the individual investors, such as Mr Pyatt(?)?	12	documents, which I will hand up to you in a moment, in order
13	MS TOUBE: Yes, so I was going to say that skeleton	13	to deal with some of the points in particular that were
14	arguments from counsel should be with you as well as the	14	dealt with either in my learned friend Mr Bompas' skeleton,
15	bundles. There may also be———	15	or were dealt with in a letter from Leigh Day yesterday,
16	UNKNOWN SPEAKER: Going—— a hearing at the moment? If	16	
			which relates either to drafting points or to how to deal
17	not I will just do—— No, yes, hearing is starting.	17	with voting.
18	MRS JUSTICE BACON: I am sorry, everybody who is not in	18	MRS JUSTICE BACON: Yes.
19	the courtroom and who is dialling in must mute themselves,	19	MS TOUBE: So I am hopeful that those points, which I
20	please. No exceptions whatsoever. Please mute yourselves.	20	can call, if I might, drafting or mechanics points———
21	If I keep hearing interferences, I am going to ask my clerk	21	MRS JUSTICE BACON: The nuts and bolts points.
22	to mute everybody. Thank you. Sorry again, Ms Toube.	22	MS TOUBE: I hope we can deal with those relatively
23	MS TOUBE: Not at all, my Lady. Mr Pyatt is here. He	23	swiftly once we get to them.
24	is sitting in the row behind me. He is a Scheme Creditor	24	MRS JUSTICE BACON: Yes. Yes.
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1	of the drafting has been last minute, so	1	MRS JUSTICE BACON: No, you haven't got instructions
2	MRS JUSTICE BACON: Yes.	2	already?
3	MS TOUBE: $$ we will have to just deal with that.	3	MR BOMPAS: I have not got any instructions on that
4	MRS JUSTICE BACON: In terms of my decision, what is	4	point and, as for the claiming, there is going to be a
5	the timing that you are expecting? Are you expecting me to	5	debate, I suspect, not—— going beyond simply the class,
6	give judgment today, by way of an ex tempore judgment, or	6	which is into the details of the convening. Now, my
7	are you expecting me to reserve? And, if the latter, have	7	learning friends have produced the documents, which may
8	you any requests as to when my judgment should be given?	8	resolve our concerns, but then again, I simply do not know,
9	MS TOUBE: So, the big picture point is that, as far as	9	not having seen them.
10	the company is concerned, we want the Scheme to go to	10	MRS JUSTICE BACON: Right, okay. So, you have not got
11	sanction as soon as possible and money to get out to Scheme	11	instructions as to appeal, so we just have to deal with that
12	Creditors as soon as possible. So that is the big point.	12	as and when. Contrary scenario: if I were to decide,
13	In terms of dates, the only question is if we are to convene	13	effectively, in favour of Mr Bompas, effectively, for the
14	meetings, we have to get on with the nuts and bolts of that	14	reasons that he gives, would you be still wanting to get on
15	sooner rather than later, and also the creditors need as	15	with things as quickly as possible, or would you then say,
16	long to consider the documents before that meeting as	16	in that case, you are going to go away and rethink?
17	possible, and we do have a sanction hearing in the diary. \ensuremath{I}	17	MS TOUBE: Well, my instructions are that if your
18	will come back to the submissions that are made by my	18	Ladyship were to adopt Mr Bompas's reasoning, which we think
19	learned friends about moving that. So, in terms of timing,	19	is completely contrary to authority, we would have to appeal
20	there is nothing that says your Ladyship has to give	20	that.
21	judgment today. It might be that you are minded to say what	21	MRS JUSTICE BACON: You would. So, you do have
22	the outcome is. So, in other words, we could look at the	22	instructions to appeal if that were the result.
23	Convening Order and say it is one class or it is two classes	23	MS TOUBE: I do. Yes.
24	or whatever your Ladyship decides, and then the judgment	24	MRS JUSTICE BACON: All right. So, in that case, we
25	reasons could be delivered later. We are really in your	25	would not be looking at putting the sanction hearing in the
	E		7

1 hands as to the most effective way to deal with that. MRS JUSTICE BACON: Well, yes. Let us take the two 2. 3 scenarios, just assuming that the only issue that is really going to divide people is the class issue. Now, if I decide in your favour, are you going to need to be building in time 5 6 for an appeal? 7 MS TOUBE: Decide in our favour? MRS JUSTICE BACON: Yes, not by you, but an appeal by 8 9 the--10 MS TOUBE: I do not know the answer to that. 11 MRS JUSTICE BACON: Yes. 12 MR BOMPAS It would depend on the reasons for your decision, my Lady, so far as I am concerned. 13 MRS JUSTICE BACON: Right, well, it may -- Yes. Okay, 14 15 let us put it this way: if I were to decide in Ms Toube's 16 favour for essentially the reason she gives in her skeleton 17 argument, and I am not saying that that is— - I will not go 18 into now, but I will address that scenario and then I want 19 to address the opposite scenario because it is essentially

MR BOMPAS: Well, my Lady, I would need to take instructions. I simply could not say now.

binary, is it not? It is a binary outcome. Either I decide

in her favour for essentially the reasons given by her, or I

decide in your favour for essentially the reasons given by

2. while you pursue the appeal. 3 MS TOUBE: Yes. MRS JUSTICE BACON: All right. So, the problem my end is that I start a trial next week, so I think a lengthy 5 6 period of delay is not going to work for me either. So, I 7 think that where we are at is that either I would give a 8 result today with reasons to follow in short order, but 9 those are not going to be detailed reasons, because it is 10 going to have to be done this week, and I have also got 11 other things in my diary this week which are not moveable. 12 So, yes, decision today with brief reasons to follow, or we come back later this week for a short, effectively, reserved 13 ex tempore judgment so that I can then deal with it and deal 14 15 with any consequential's then before my trial starts next 16 week. Is everyone available, for example, first thing on 17 Thursday morning? 18 MR PYATT: I would be, my Lady. MRS JUSTICE BACON: That is a rather unexpected -- I am 19 2.0 just going to rise while someone gets the lights back on, and then you can give me details of your availability on 21 22 Thursday.

diary, because effectively then things would come to a halt

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(10.37 a.m.)

(10.38 a.m.)

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(Short break)

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1	MRS JUSTICE BACON: All right. Let us continue.
2	MS TOUBE: I am available on Thursday.
3	MRS JUSTICE BACON: All right.
4	MS TOUBE: I don't know if Mr Smith and Miss Cooke are.
5	Mr Smith confirms that he can make himself available, if
6	that is necessary.
7	MRS JUSTICE BACON: All right. I think that may be the
8	best way forward.
9	MISS COOKE: Apologies. I am not available on Thursday
10	morning, but I may be able to attend remotely.
11	MRS JUSTICE BACON: Yes. All right. Well,
12	provisionally , let us I think if you can keep Thursday
13	morning first thing free, and if I can, I will give the
14	result at the end of today's hearing. If I cannot, you will
15	get it on Thursday, all right?
16	MS TOUBE: Thank you very much, my Lady. That is very
17	helpful. In terms of order of submissions, what we were
18	going to suggest—— Obviously, we are in your Ladyship's
19	hands as to the most appropriate way to do this, but I was
20	going to go first . The FCA was going to go second. The
21	Investor Advocate was going to go third. Mr Pyatt would
22	then like to go fourth. Mr Bompas would go fifth, and then
23	if there are any other Creditors who wish to address the
24	court, we would suggest they could address your Ladyship
25	then.

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1 MRS JUSTICE BACON: I am not sure Mr Pyatt going fourth 2. makes much sense because it seems to me from at least 3 reading his written submissions that there is a large degree of overlap between what he is saying and what Mr Bompas is 5 saying. Would it not make more sense for Mr Bompas to go fourth and then, in so far as Mr Pyatt has additional 6 7 submissions, for him to make those afterwards? MS TOUBE: My Lady, I am only pausing because I do not 8 9 think I have seen any written submissions from Mr Pvatt. 10 MRS JUSTICE BACON: Oh. Well, I have. Has anyone else 11 received those? 12 MR PYATT: The Investor Advocate did, and the FCA did. 13 MRS JUSTICE BACON: All right. Is there any reason why 14 those were not copied to all the other parties? 15 MR PYATT: I think (inaudible). I thought the Investor 16 Advocate would send it on. 17 MR BANNISTER: I sent them to Clifford Chance. I can 18 pass them on now. 19 MR PYATT: Well, he passed on the correspondence, but I 2.0 don't think those were written submissions. 21 MS TOUBE: Well, of course we are in your Ladyship's

5 reading on the reading list . In terms of the skeleton 6 7 looked at the report of the Investor Advocate. The 8 9 remainder, I am afraid, I have not got to. over it , please do say so. What I was proposing to do—- As 13 14 we have put in, obviously, quite a full skeleton argument, I was proposing to take this matter from my skeleton, 15 16 highlighting important points and taking your Ladyship to documents where relevant. Then, of course, I will deal with 17 18 the points raised in Mr Bompas's skeleton as we go through. 19 Again, I was not proposing to take up time in relation to

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MS TOUBE: I will take a look at what those points are

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hands as to all that.

in due course.

MRS JUSTICE BACON: All right.

couple of pages. So, please could that be provided as soon 6 7 as possible to all of the counsel here. Mr Pyatt, do you have any objection to going after Mr Bompas, because you 8 9 have presumably——-10 MR PYATT: No. I'm fine, my Lady. It's fine. 11 MRS JUSTICE BACON: Right, because I do not want there to be any repetition, and it seemed to me that a lot of what 12 13 you say is already being said by Mr Bompas. 14 MR PYATT: Yes. If he's talking about classification, 15 that's correct, but there are other points. MRS JUSTICE BACON: Yes. There are other points, yes. 16 17 All right, so Mr Bompas will go fourth, and then Mr Pyatt. 18 and then I will hear briefly from Mr Allan and then Mr 19 Dickenson, and just to say now, I do not expect to be having lengthy submissions from any of Mr Pyatt, Mr Allan and Mr 20 2.1 Dickenson because, certainly on the question of class 22 composition, I will have heard from Mr Bompas by that time already. All right. Thank you. 23 2.4 SUBMISSIONS by Ms TOUBE 2.5 MS TOUBE: So, my Lady, if I might just check what you 1 have had an opportunity to read. I think we were pretty 2 much agreed on what the reading list should be. I do not 3 know if you have had an opportunity to read it. MRS JUSTICE BACON: Yes. I have done most of the arguments and the witness statement, I have not-- So, I have looked at the whole of the witness statement. I have 10 MS TOUBE: Well, I will take you to the things as I think I need to as we go through. If there is anything in 11 12 particular that you would like to see when I offer to skip

MRS JUSTICE BACON: Yes. All right. Somebody needs to

ensure that those written submissions -- We are talking

about a document entitled, "Introduction and Overview" on

an appendix, and then there is another appendix with another

the first page. It is six pages of submissions, including

general terms. Just to flag up, I have read the passage in 12

you both on is the question about class composition and what

authorities there are which address third party claims in

MRS JUSTICE BACON: No. What I will want to hear from

most of the authorities, in particular, where the legal

points are not in dispute and the law is well settled.

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the judgment of Zacaroli J in the Re Gategroup Limited [2021] EWHC 304 case which you referred me to. I have also 3 read some of the Re UDL Holdings Ltd [2002] 1 HKC 172 case, 4 including from a passage that you did not refer me to. $\,$ I 5 would like your submissions in due course on - let me just find it - on the passage at p.185-186 in relation to third 6 party claims. That is 185-186 of the UDL Holdings case and 7 the judgment of Lord Millett, NPJ, but if there are other 8 9 authorities which go to the question of third-party claims 10 and also to the distinction between rights and interests 11 where third-party claims are involved, that would be very 12 helpful because, at the moment, I do not think either of you 13 have cited very much on that, and that maybe because there 14 is not very much on it. 15 MS TOUBE: Yes. I will take you also to Re Apcoa 16

MS TOUBE: Yes. I will take you also to Re Apcoa Parking Holdings GmbH [2014] EWHC 3849 (Ch), which was a case we added to the end of the bundle once we saw the way in which the case was being put, so, yes, I was intending to take you to that.

20 MRS JUSTICE BACON: All right.

MS TOUBE: But I will not, for instance, take you to cases on releases, for instance, because those are not really the issues before your Ladyship today. So, as your Ladyship will have seen, at the heart of the Scheme is a

fairly simple proposition, although the mechanisms for

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bringing it into effect are a bit more complicated. As your Ladyship will have seen, the Scheme Creditors have potential claims against the company, which the company denies. If those claims were to be litigated, either by Creditors or by the FCA, that litigation will take time, will be uncertain, and will ultimately diminish the assets of the company. In fact, it may lead to no recovery for Scheme Creditors if they cannot establish their claims, but if the claims are established, that would force the company into liquidation.

fact, it may lead to no recovery for Scheme Creditors if they cannot establish their claims, but if the claims are established, that would force the company into liquidation.

MRS JUSTICE BACON: So, you say it is a lose—lose?

MS TOUBE: It is. Yes, effectively, lose—lose, and so, as a result — and in order to ensure that Scheme Creditors have a certain recovery and have it as soon as possible — what the Scheme does is to establish a trust which has in it the monetary value of all the assets of the company which were sold, a contribution by the Parent of £60 million, together with a further £2.5 million towards the costs of the Scheme, and the proceeds of various insurance policies. So, that trust fund will be distributed, apart from a reserve to meet other claims, which I will come back to later.

22 MRS JUSTICE BACON: Yes. £42.5 million or something 23 like that.

MS TOUBE: It is £46.5 million.

MRS JUSTICE BACON: Yes.

STICE BACON: Yes

Yes.

2 chunk and then, depending on what happens with the reserve, 3 a second chunk to Scheme Creditors in proportion to the 4 shares that they hold. So, all Scheme Creditors will be 5 treated the same under the Scheme, and that is an important point which I will come back to later in the context of 6 7 CLOS. Now, in return, the Scheme Creditors will release 8 their claims against the company. They will also release 9 some related claims, but not claims against the solvent 10 third parties against whom they have separate claims, and 11 again I will come back to that later. They will get 12 whatever they get from the trust fund, and they will get it 13 sooner. Now, as your Ladyship knows, this also means that 14 any application for compensation from the FSCS will go away 15 because there will be no claim established. I will come back to all of the detail of this in a minute but in 16 17 essence, that is what the Scheme is about. Now, your 18 Ladyship may have seen a worked example in the documents, 19 and it is worth just, I think, taking a look at that at this 20 2.1 MRS JUSTICE BACON: That worked example was inserted as 22 a result of questions raised to the Scheme, and to the 2.3 Investor Advocate, Lexpect. 2.4 MS TOUBE: Absolutely right. So, it was a suggestion

MS TOUBE: That fund will be distributed in an initial

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that was made, which was a lot of Scheme Creditors would

1 find it difficult to work out exactly what they were going 2. to get. I think Leigh Day also raised this point, and it is 3 in Bundle C, tab C1, at p.110 of the bundle. Now, it was pointed out to me this morning, quite rightly, that column D 5 does not make any sense and is just a repetition of column F, but in a slightly less sensible manner, so ignore column 6 7 D for now. What you can see is the various share classes, 8 the settlement per share class, which is just a division of 9 the money up between the classes. How much—— This is 10 column E. How much each Scheme Creditor will get if it is 11 just the initial distribution. Column F is how much the 12 maximum is they could get if all of it is distributed. 13 MRS JUSTICE BACON: But does that include the reserve? MS TOUBE: It does, yes. The difference between E and 14 15 F is the reserve. So. E is what we estimate they are 16 definitely going to get, and F is the higher end. So, again, as your Ladyship will have seen, that is why we say, 17 18 "up to" because somewhere between E and F is what is likely. 19 Then, G is what the FCA-- if the FCA were to fight and win 2.0 and make the order exactly as it did, so the £298 million, 21 that is what the FCA is saving the loss is. So, we thought 2.2 that this would help to show your first distribution will be E, your second distribution, if you get one, will be up to 2.3 2.4 F, and G is what you would get if you fought and won 2.5 everything.

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might win," but we have no idea what that figure would be.

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MRS JUSTICE BACON: I see.

1	MRS JUSTICE BACON: Is there a comparator here with	1	MS TOUBE: So, we have taken the FCA because the FC
2	what would be obtained under the FSCS, or is that	2	has done an independent investigation into it and has come
3	effectively G?	3	up with this figure. Now, as your Ladyship knows, the
4	MS TOUBE: No. The problem is, of course, we do not	4	company does not agree this, but this is a useful
5	know which of these claims would be worked out, or what the	5	comparator.
6	FSCS would pay and what claims people have, and who is	6	MRS JUSTICE BACON: Do we have any figure as to the
7	protected, and who is not protected because we would have to	7	pence in the pound? I did see a figure of 77p in the pound
8	work out who is a private investor and who is not a private	8	floating around somewhere.
9	investor. So, that is a very difficult	9	MS TOUBE: Well, the 77 is the percentage of the FCA
10	MRS JUSTICE BACON: No. All right, but assuming that	10	value if what we end up in is column F. So, column F
11	someone did have a protected claim, is G effectively the	11	MRS JUSTICE BACON: Oh. It is F against G.
12	maximum that they would be able to get from———	12	MS TOUBE: F against G.
13	MS TOUBE: Sorry. Yes. That is correct.	13	MRS JUSTICE BACON: Not E against G.
14	MRS JUSTICE BACON: Is it setting a cap?	14	MS TOUBE: No. So, that is why we use the phrase "up
15	MS TOUBE: It is a cap.	15	to" and you will see that over the page what we have done,
16	MRS JUSTICE BACON: Because obviously there would	16	we have explained what all these columns are on p.110, and
17	be	17	then on 111 we have said, "Well, here is a worked example."
18	MR PYATT(?): No. It is not.	18	You will see paras.1 and 2 explain that, and then you will
19	MS TOUBE: Well, I think———	19	see the 61 per cent is what would happen if we only end up
20	MRS JUSTICE BACON: No. You can speak later.	20	with E. So, E is 61 per cent and F is 77 per cent.
21	MS TOUBE: I think the point is that if the company had	21	MRS JUSTICE BACON: Right. Yes. That makes sense.
22	all the money to pay it, then the FSCS would not need to pay	22	Thank you.
23	compensation. The FSCS pays the compensation if the company	23	MS TOUBE: So, I am just reminded, although I think
24	cannot pay all the money.	24	your Ladyship has this point, that of course the various
25	MRS JUSTICE BACON: Yes, yes. Which would be the case,	25	conditions that the FSCS would have to be satisfied,
23	Wild 303 Fiel BACOIN. Tes, yes. Which would be the ease,	23	conditions that the 13c3 would have to be satisfied,
	17		19
1	17 yes.	1	19 including: it is a claim; it is a protected claim; it is a
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	yes.		including: it is a claim; it is a protected claim; it is a
2	yes. MS TOUBE: Which would be the case if it is all	2	including: it is a claim; it is a protected claim; it is a valid protected claim, etc.
2	yes. MS TOUBE: Which would be the case if it is all litigated out.	2	including: it is a claim; it is a protected claim; it is a valid protected claim, etc. MRS JUSTICE BACON: Of course.
2 3 4	yes. MS TOUBE: Which would be the case if it is all litigated out. MRS JUSTICE BACON: Yes.	2 3 4	including: it is a claim; it is a protected claim; it is a valid protected claim, etc. MRS JUSTICE BACON: Of course. MS TOUBE: So, the only other point it might be worth
2 3 4 5	yes. MS TOUBE: Which would be the case if it is all litigated out. MRS JUSTICE BACON: Yes. MS TOUBE: So, I think your Ladyship is right that that	2 3 4 5	including: it is a claim; it is a protected claim; it is a valid protected claim, etc. MRS JUSTICE BACON: Of course. MS TOUBE: So, the only other point it might be worth just looking at while we are in the bundles is at p.344.
2 3 4 5 6	yes. MS TOUBE: Which would be the case if it is all litigated out. MRS JUSTICE BACON: Yes. MS TOUBE: So, I think your Ladyship is right that that is the highest figure that would work, assuming the company	2 3 4 5 6	including: it is a claim; it is a protected claim; it is a valid protected claim, etc. MRS JUSTICE BACON: Of course. MS TOUBE: So, the only other point it might be worth just looking at while we are in the bundles is at p.344. This is tab 7, and this is the FCA redress amount, which you
2 3 4 5 6 7	yes. MS TOUBE: Which would be the case if it is all litigated out. MRS JUSTICE BACON: Yes. MS TOUBE: So, I think your Ladyship is right that that is the highest figure that would work, assuming the company can pay everything, which it cannot, if it has to pay	2 3 4 5 6 7	including: it is a claim; it is a protected claim; it is a valid protected claim, etc. MRS JUSTICE BACON: Of course. MS TOUBE: So, the only other point it might be worth just looking at while we are in the bundles is at p.344. This is tab 7, and this is the FCA redress amount, which you are seeing reference to. So, it is where the 298 million
2 3 4 5 6 7 8	yes. MS TOUBE: Which would be the case if it is all litigated out. MRS JUSTICE BACON: Yes. MS TOUBE: So, I think your Ladyship is right that that is the highest figure that would work, assuming the company can pay everything, which it cannot, if it has to pay everybody and litigates and spends all the money on the	2 3 4 5 6 7 8	including: it is a claim; it is a protected claim; it is a valid protected claim, etc. MRS JUSTICE BACON: Of course. MS TOUBE: So, the only other point it might be worth just looking at while we are in the bundles is at p.344. This is tab 7, and this is the FCA redress amount, which you are seeing reference to. So, it is where the 298 million figure comes from.
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MS TOUBE: Column G.

MRS JUSTICE BACON: All right. So, this simply

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provides the workings for column G.

MS TOUBE: It does, and this is to answer one of the points that was made by my learned friend, Mr Bompas's clients, which was they could not see where that figure had come from.

MRS JUSTICE BACON: Yes.

MS TOUBE: So, that is what the Scheme does and how it works and what the figures are. I thought it might help just briefly to address your Ladyship on where the various interested parties are on the Scheme. Starting with the FCA, and your Ladyship will have seen that the FCA is supportive of the Scheme, and obviously you will be able to hear from Mr Smith about their position in due course, but the FCA is not only entered into the settlement, which is the underlying basis of the Scheme, given an announcement supporting the Scheme which we will look at in just one minute, but has also looked at drafts of the Scheme, the explanatory statement, and the evidence to ensure that we are not putting their position inaccurately.

MRS JUSTICE BACON: Yes.

MS TOUBE: It is worth again going back to the bundle at C4, p.268, and this is the FCA's announcement, which we call the April announcement. This is their own estimation of what they have done and also what they believe are the appropriate the results of what has happened in the company

and in relation to the Scheme. I was going to draw your attention in particular to p.269, about halfway down, after the FCA has gone through all the various things it has done and the conclusions it has reached. There is a paragraph, "If the sale is ...completed" and that happened yesterday, "...and the Scheme becomes ...effective" Can I just ask your Ladyship to read that paragraph?

MRS JUSTICE BACON: So, at that point, the findings of the investigation will be published. Yes.

MS TOUBE: Then, in the next paragraph is the point that we have made, which is, the Parent will not make the redress contribution, and then the following point is the £298 million redress amount you will see referred to there. Then in the following paragraph the FCA points out that although it will not be the full address amount, the FCA considers it in the interest of the investors to be given the opportunity to consider the Scheme. Then, there is the 77p figure there.

MRS JUSTICE BACON: I see.

MS TOUBE: I think that is all I was going to ask you to look at there

MRS JUSTICE BACON: Is the point that if this were to go ahead with an enforcement case requiring the payment of the full redress amount, the money simply would not be

there, even before one takes account of penalty and the

1 litigation costs.

2 MS TOUBE: Yes. So that you would not get a Parent 3 contribution of £60 million, you would have everything being 4 litigated and, therefore, costs.

MRS JUSTICE BACON: And you would sacrifice the 5 6 penalty

7 MS TOUBE: And you would sacrifice the penalty.

8 MRS JUSTICE BACON: Yes.

9 MS TOUBE: And your Ladyship will have seen from my 10 learned friend Mr Smith's skeleton that they estimate that 11 if the Scheme is not agreed, regulatory action would be 12 uncertain or costly, and would be unlikely to conclude before 2025. That is a point made in my learned friend's

13 14 skeleton at paras.19 to 21

16 when would the penalty and redress amount be payable? Would 17 it be payable only at the end of the FCA enforcement

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proceedings? MS TOUBE: Yes. So, there would have to be enforcement 19

proceedings. It would be a determination of what, how much,

MRS JUSTICE BACON: Yes. In terms of the timeline,

2.1 if any. As you know, again, the company disputes these, so

22 there would be litigation . There would be a determination

23 of what, if any, is owed. Then, it would have to be paid,

2.4 assuming no appeals, etc. So, that is the time. So, that

£298 million - as I think, again, the FCA very fairly

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recognises in their skeleton - is a figure that they have 1 put on it now, but not necessarily a figure that one would 2. 3 end up with at the other end

MRS JUSTICE BACON: I see. So, this is necessarily 5 provisional because, as described at 21, the FCA board would 6 have to review all this and be satisfied that the proposed 7 penalty and restitution amount or redress amount was 8 appropriate. That would take some time and would involve 9 notification and submissions from the company. That would 10 then result in a decision notice. At that point, in 11 principle, would the penalty and redress become payable, or 12 would that normally be suspended?

MS TOUBE: I am being reminded from behind, yes. It does not become payable until one gets to the end of the adjudication process.

MRS JUSTICE BACON: So, does that mean that the Upper Tribunal would then hear the appeal from the company, the reference of the FCA decision, and then at the end of that process, the penalty would become payable?

2.0 MS TOUBE: Yes. So, it is only when you get to the end 21 of the Upper Tribunal process that you know. Is there a 2.2 liability? What is it for, and what is the quantum? That 23 is the 2025 timeline

2.4 MRS JUSTICE BACON: That is the date. I understand.

MS TOUBE: And that is the reason why the FCA comes to 25

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the conclusion that they do in para.22 of their skeleton, although they did not get all the answers they wanted, they which is that it is better for investors not to wait for did get enough answers for them to be able to determine what 3 that. That conclusion is reached even taking into account 3 they thought of the Scheme. So, at para.1.9 on p.1085, you will see that, "8 members of the Committee supported the 4 possible FSCS recovery, because my learned friends deal with 4 that in paras.24 to 26 of their skeleton. Scheme, and one remained undecided." 5 5 6 MRS JUSTICE BACON: Just so I understand your position MRS JUSTICE BACON: So, which -- So, paragraph ----6 7 for the company, your position is that in the event that 7 MS TOUBE: Paragraph 1.9, on p.1085. this procedure was followed, the company would inevitably 8 MRS JUSTICE BACON: All right. 8 9 refer the FCA decision to the upper tribunal. The company 9 MS TOUBE: We can also see from para.3.19, which is on 10 10 would not simply accept it. p.1093, you will see that: One member said they found it difficult to recommend 11 MS TOUBE: Yes. 11 12 MRS JUSTICE BACON: You are saying to me on 12 the Scheme from the perspective of an individual investor 13 instructions the company would be referring it. 13 due to the lack of ability to negotiate any of the terms of 14 the Scheme and there being no real insight into the MS TOUBE: Yes. So, you will see in the evidence the 14 15 company disputes the litigation of the investors and also 15 likelihood of success of the litigation . The remaining 16 members, some of whom took comfort from the investigations 16 the regulatory entity 17 MRS JUSTICE BACON: Yes. All right. 17 carried out by the FCA and its support for the Scheme, and 18 So that is the position in relation to the FCA. Then, 18 after raising concerns over the oversight of the Reserve in relation to the investor Committee, and I do not know if 19 19 Amount, expressed their support for the Scheme." your Ladyship did have an opportunity to look at that. 20 It is worth looking at a couple of other paragraphs in 20 2.1 MRS JUSTICE BACON: I do not think I did. 2.1 this. Going back to p.1085, at para.1.11, you will see this MS TOUBE: So, if we go to the bundle at tab D1, if we 2.2 22 is the conclusion of the Chair. Can I just ask your can just look at p.1085 of the bundle. Ladyship to read that paragraph, para.1.11? 2.3 23 2.4 MRS JUSTICE BACON: So, how was the Committee made up? 2.4 MRS JUSTICE BACON: (After a pause) Yes. 25 MS TOUBE: So, you can see from the executive summary, 2.5 MS TOUBE: So, they say they do not -- they cannot say 27

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but if I can just summarise it this way: there are nine members of the Committee, and there was a call for anyone who wanted to to apply, and then there were a certain number of institutional investors and a certain number of retail investors. You will see, for example, at p.1087, para.3.1: "The Committee members are drawn from a range of backgrounds, and I would describe some of them as sophisticated individual investors as well as being familiar with the financial services industry.' But there were also -- Once there had been eight, there was a ninth added, and you can see this from para.2.5, and that was somebody who was a member of the Leigh Day/Harcus Parker claimant group. There may have been more, but there was one who was specifically chosen for that purpose. So we ended up—— or they ended up with nine investors on that committee and, again, it is probably worth your Ladyship looking at this report when you have a moment rather than my taking you through all of it. MRS JUSTICE BACON: I have noted it. I will do. MS TOUBE: What you will see is that it was an iterative process. So, they asked questions of the company. they asked questions of the Parent, they asked questions of the FCA, and they met with representatives of all those persons. So, they conducted their own investigation,

effectively, into the matters that they wanted to ask, and

1 they have achieved the best possible outcome for investors, 2. and I should say that is a matter that, if necessary, I will 3 come back to at sanction, but schemes do not have to be the best schemes, and they just have to be better than the 5 relevant alternative. Then there are, of course, fairness 6 questions, but if a scheme has a support of a representative 7 majority, then the court will always be slow to differ from 8 that majority because it is for creditors to determine their 9 own interests, and they, of course, express those by voting 10 for or against the Scheme. 11 MRS JUSTICE BACON: What this paragraph does not

12 address, I think, is the availability of FSCS compensation 13 for some of the creditors MS TOUBE: I think they do deal with that. 14

15 MRS JUSTICE BACON: But that is not the counterfactual 16 in 1.11 MS TOUBE: No, that is true, but if you look, for 17

18 example, at p.1093, at para.3.18, you will see that they do 19 look at the FSCS position. 2.0 MRS JUSTICE BACON: Yes.

21 MS TOUBE: So, they expressly consider that and say, 2.2 "Well, we do not really know. Maybe, maybe not," but you

23 will see that they took advice on that particular point.

2.4 MRS JUSTICE BACON: And just so I understand it, the 2.5 FSCS compensation would not simply become payable following

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the conclusion of the FCA redress enforcement proceedings at the end of the Upper Tribunal but would require separate 3 proceedings to be brought based on the statutory provisions 3 4 relied on. Is that correct? 4 proceedings, the FCA proceedings themselves, would be MS TOUBE: Not-- That is unlikely. They would 5 5 normally make their own decision, so that the FSCS would 6 6 7 say, "Well, now I have got-- Have you made a--" It would 7 then be up to an investor to make a claim. The FSCS would 8 MS TOUBE: Yes. So, just to finish up on this point, a 8 9 consider, "Is that a valid claim?" 9 10 MRS JUSTICE BACON: All right, but this paragraph talks 10 about litigation. What litigation is referred to in that 11 11 12 paragraph? Are we talking about the Upper Tribunal 12 13 adjudication? Or are we talking ----13 MS TOUBE: No, this is the underlying litigation. 14 14 15 MRS JUSTICE BACON: No, what is the "this"? 15 said. "No." 16 MS TOUBE: So, the litigation that they are talking 16 17 17 about there is the litigation that is being brought by 18 people such as my learned friends. 18 MRS JUSTICE BACON: Yes, so the ----19 19 20 MS TOUBE: So this is not dealing with the FCA 20 2.1 21 regulatory point. MRS JUSTICE BACON: It is not dealing— - That was my 2.2 2.2 23 2.3 question. So, if the Scheme was rejected, it would not be 2.4 sufficient to make claims from the FSCS that the FCA had 2.4 of interaction with the FCA. You have seen already that reached its decision and that had been endorsed by the Upper

Tribunal. What you are saying is, in addition, there would have to be the pursuit of the individual civil claims by the investors. Is that right?

MS TOUBE: I think that is not quite right because I think that another way of establishing a valid claim would be to be parasitic on the FCA restitution decision. So, assuming that that one now gets to the Upper Tribunal, that is all determined and there is an amount, it is possible that that may also be a valid claim.

10 MRS JUSTICE BACON: All right. So they might not have 11 to go through separate settings?

12 MS TOUBE: They might not also have to conduct 13 litigation, yes

MRS JUSTICE BACON: All right.

MS TOUBE: I am reminded that we had this discussion 16 last week, and the answer is it is not absolutely clear what happens when the FCA makes a decision, what the FSCS will 18 do.

19 MRS JUSTICE BACON: All right.

> MS TOUBE: But, as I say, that is an open question, but whatever happened, one would have to get to that position first before having anything that could even potentially be a valid claim, which is two years down the line.

MRS JUSTICE BACON: This is the reason for your para.5(5), that the company believes that establishing a

 claim — a valid claim under the FSCS would be likely to

require litigation and/or regulatory actions. You are

saying it is not clear to you whether the regulatory

sufficient, or whether in addition civil proceedings under

the relevant statutory provisions would need to follow their

couple of other points which are worth looking at in this report. So, p.1091, and this is para.3.10.1, you will see reference there to what I told your Ladyship about meetings with the Parent. So, there was a representative of the Parent who came to talk to the Investor Committee and was asked, "Would you put any more money in?" And the Parent

MRS_IUSTICE_BACON: Yes

MS TOUBE: Then, just to finish that point, if you look over the page onto p.1092, at para 3.13.6---

MRS JUSTICE BACON: Yes, the FCA cannot compel the

Parent to make any more contributions.

MS TOUBE: Exactly, and then, I will not take time, looking at the time we are taking already, but you will see

if you look at the report that there were a lot of instances

comfort was taken from that, including the point that your

1 Ladyship has just noted, but also the fact that return to the creditors from the FSCS would only be available after 2.

3 litigation, which we have just spoken about, and the fact

that the Committee took comfort from the extent of the FCA's

5 negotiations with the company, and that is at 3.14 on 1092,

6 which you were just looking at.

MRS JUSTICE BACON: And what is not entirely clear from this report is what is meant by, "Following the conclusion

8 9 of the litigation process.' 10 MS TOUBE: Well, yes, I understand that point, but the 11 position is that whatever -- even if the FCA did 12 automatically result in FSCS compensation, that is two years

down the line, and will take time and money and be uncertain

and all the other things that we have said. So, the other 14

15 point just to mention is the reduction of the reserve, and 16

that is mentioned at para.3.22, which is on p.1093. Your 17 Ladyship may recall the reserve was originally 50 million,

18 and after discussions it was reduced to 46.5 million. So,

19 the Committee has concluded, as a result of all these

2.0 investigations, that at least eight out of nine of them

21 support the Scheme, and the ninth is undecided. Then, the

2.2 position of the Investor Advocate, and obviously your

23 Ladyship will hear from the Investor Advocate, but you will

2.4 have seen the report, which is at p.987.

MRS JUSTICE BACON: Yes, I have read that. 2.5

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1 MS TOUBE: I was not proposing to take you to that 2 because I know you have had an opportunity to look at it, 3 but just noting a few headline points. The first is the 4 point about the worked example, which obviously we have taken to heart and have done. The second is the question of 5 notice, and there, just for your reference, it is p.1002: 6

"[Considering] the steps that have been taken ... and the level of engagement ... reasonable efforts have been made to draw the existence of the Scheme to the attention of the Scheme Creditors [in the view of the Investor Advocate].'

Then, in relation to class composition - again, for your note, that is at pp.993 and 994 - the Investor Advocate has made the same points that we have in relation to this being rights and not interests, and rights against the company and not against the FSCS.

MRS JUSTICE BACON: Well, my understanding was that the Investor Advocate is formally neutral on those points, and was simply referring the questioners to the briefings from the company's legal advisors at Clifford Chance.

20 MS TOUBE: Yes, they are neutral, that is absolutely 2.1 right, but they were also stating what the position is as a 2.2 matter of the law.

MRS JUSTICE BACON: Yes. 2.3

> MS TOUBE: The Investor Advocate -- Miss Cooke's skeleton deals with this at para.18.

MRS JUSTICE BACON: Yes, well, the Investor Advocate does not advance things -- That is not a criticism, but Miss Cooke's skeleton is setting out, effectively, the neutral position of the Investor Advocate. The Investor Advocate is not arguing for a particular application of those principles, which is quite properly setting out the principles, and has described the position of the company and the creditors.

MS TOUBE: Yes, absolutely right, but the fact is, as we will come on to in a minute, it is absolutely right to say that one looks at rights against the company and not the rights against third parties. Before we get to Mr Bompas' client, the final person we should look at is the FSCS, and your Ladyship will have seen that the FSCS does not object to the Scheme. Their position is set out in what is called the FSCS Non-Objection Letter, which is at p.965 of the bundle. This is at tab 20, if you are still working from the hard copy.

18 MRS JUSTICE BACON: Yes, well, that is very short. MS TOUBE: It is short, and you will have seen two 21 points of relevance. First of all, that the FSCS's position 2.2 is that it has not made any determination to whether the 23 company is in default or whether there might be claims 24 against it, that if it was in default, it would pay compensation in accordance with its rules, and then claims

other than the Scheme's claims, and you will have seen we

made mention of this at the end of our skeleton about those

3 claims that are outside the Scheme, and the FSCS would, if

4 it paid monies to any of those outside the Scheme payments,

become subrogated. It understands that there is not any 5 money outside the Scheme, and therefore it would decide 6

7 whether it would make any sense to try and recover anything.

8 Then, para.11 is it does not object. So, that is the FSCS's

9 position.

10 MRS JUSTICE BACON: All right.

11 MS TOUBE: Then, Mr Bompas's clients. The first 12 question is the class question, which we will come back to 13 in a minute, and then the second question is roadblocks. 14 So, there is some suggestion in my learned friend's skeleton 15 that the reserve could be exhausted, and therefore it is said that the Scheme is unclear. First of all, that would 16

not be a roadblock, and secondly, as we have seen, it is 17 18 actually clear about what the minimum return could be. We

19 have seen that from the worked example. Then, the only

20 other points are the nuts and bolts points. So, that is, in

2.1 outline, everybody's positions. I was now proposing to take

22 this from our skeleton, starting at para.2, and I was not

23 proposing, particularly bearing in mind the lack of time, to 2.4 go through all the background which is set out there.

2.5 MRS JUSTICE BACON: You can take it that I have read

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1 your skeleton argument.

2. MS TOUBE: Thank you. What you will see is that this 3 is a compromise. The company does not accept the validity of the claims, but the FCA has reached the conclusion that it has reached. Now, before we look at any of these points, my learned friends have picked up a couple of drafting 6 7 points. In particular, the phrase "Scheme Creditor" is used 8 in slightly different wording. As your Ladyship can 9 imagine, that is what happens when one is drafting lots of 10 different documents, in particular because the Explanatory 11 Statement is supposed to be a summary of the Scheme, but 12 what we have tried to do overnight is to redraft these 13 various bits and pieces so that, for example, in relation to 14 Scheme Creditors, it just is cut and pasted from the rules, and also, the Explan will say, if the Scheme Rules say 15 16 something different, it is the Scheme Rules that apply.

18 happened to lots of things. I think probably it makes sense 19 just to hand it round now. Nobody is going to have any time 2.0 to look at these bits and pieces now, but I suggest people 2.1 look at it over lunch and if there are any issues on it. your Ladyship can be notified of them. What we have done is

So, there is quite a lot of redrafting that has

2.2 23 we have done it in clean and also mark-up, so everybody can

2.4 see all these changes. There are a lot of documents, but

2.5 there are not actually a lot of changes. The biggest

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changes are to the voting form because my learned friends MS TOUBE: I am hoping not to go into the afternoon. picked up a lot of points on those. In relation to the 2 What I was hoping to do is finish my submissions, and then 3 voting form, we would be very happy to have any further 3 it may be we need a sweep up on the nuts and bolts, because 4 points that Mr Bompas and his clients come up with on that. 4 We want to make it as clear as possible. In relation to the 5 Leigh Day letter, which picked up a whole load of additional 6 points, what I was proposing to do was put together a 7 schedule which deals with those point by point, and then 8 8 9 just say, "Here are all the answers to that," rather than, 9 10 10 in a very laboured way, going through it all with your sense? 11 Ladyship this morning. 11 MRS JUSTICE BACON: Yes. Are you saying you will just 12 12 13 hand up your schedule? All right, that is useful. 13 14 MS TOUBE: So, the schedule is not-- Ah, it is now. 14 15 We were having problems printing it this morning. So, what 15 I have got for your Ladyship is all the various documents 16 16 with post—it notes on the front of them trying to identify 17 17 18 what they are, and the schedule with the Leigh Day document, 18 19 and there are bundles which can be handed out with all of 19 this. Obviously, having got my learned friend's letter 20 20 21 yesterday, we have been working hard to deal with all these 2.1 2.2 22 2.3 MR BOMPAS: My Lady, the letter came yesterday because 23 2.4 we had the papers, effectively, on the Friday. (Inaudible). 2.4 25 MRS JUSTICE BACON: I do not suppose that there is 25

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1 anyone who has or could prepare a supplemental bundle with all of the new documents in? Is that it? Does that contain 2. 3 all of these? All right, let me hand these back. Is this available in electronic form? Could it perhaps just be sent 5 to my clerk? All right, let us give this back. 6 MS TOUBE: The one thing that is not in the bundle is 7 the schedule MRS JUSTICE BACON: No, and I have got that. 8 9 MS TOUBE: So, let me give you the bundle. 10 MRS JUSTICE BACON: If someone could send that to my 11 clerk before lunch, that would be very helpful. 12 MS TOUBE: Yes, of course. MRS JUSTICE BACON: All right. Is there a spare copy 13 14 that my judicial assistant could use? Many thanks. MS TOUBE: Do you need also a spare copy for the 15 schedule? 16 17 MRS JUSTICE BACON: And of the schedule. All right. 18 MS TOUBE: So, I was not actually proposing to go

2.2 with your Ladyship this morning. 23 MRS JUSTICE BACON: Well, yes. When are you going to 24 sit down? Because if you are going to go into the

questions. I would much rather focus on the class points

later today, once we get to all those nuts and bolts

anywhere near the schedule possibly until at some point much

afternoon, are we going to finish today?

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the only question is how exactly the voting form is phrased. MRS JUSTICE BACON: Can I suggest, then, that everyone makes their submissions on class composition, over lunch everyone can look at the schedule, and after I have heard everyone on class composition, I will then have submissions from everyone on all of the other issues . Does that make MS TOUBE: It might make more sense to deal with all the issues except for this, except for the voting form, this morning, because then we can just -- because a lot of those MRS JUSTICE BACON: Yes, all right. That is fine. So, everything other than the schedule we will deal with, and then we will come back to the schedule at the end of the day. Is that your proposal? MS TOUBE: Yes. So, in the interest of time, I am going to skip to para.5 of the skeleton, which deals with the relevant alternative. I am not going to say very much more than what is already in there, except—— MRS JUSTICE BACON: No, I have read that. MS TOUBE: -- draw your Ladyship's attention to the relevant alternative in insolvency, which you know. Then, I 39

1 think, we can go straight to para.11. That section deals 2. with the background which, as I said to your Ladyship, I am 3 not going to deal with except for noting a couple of points. Paragraph 15, there were 9 different share classes, and para.16, there are 133 direct investors. 5 6 MRS JUSTICE BACON: The 9 share classes are on the 7 worked example table? MS TOUBE: Yes. So, para.16, I was just setting out 8 9 different sorts of investors, so there are 10 individual 10 investors, but then there are funds of funds and there are 11 intermediaries. Most of them are intermediaries, so we have 12 got 10 individuals, 19 funds of funds, and 104 brokers. So, 13 we think that there are approximately 250,000 Scheme 14 Creditors 15 MRS JUSTICE BACON: So, 10 individuals, 9 funds of 16 funds----MS TOUBE: 19. 17 18 MRS JUSTICE BACON: 19, sorry, and how many brokers? 19 MS TOUBE: 104. 2.0 MRS JUSTICE BACON: 104, and the investors represented 21 by Mr Bompas fall into which category? 2.2 MS TOUBE: We do not know that. 23 MRS JUSTICE BACON: But presumably not the 19 funds of 2.4 funds?

MS TOUBE: No, presumably not.

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1	MRS JUSTICE BACON: So, either category one or three?	1	statement.
2	MS TOUBE: Yes, presumably.	2	MS TOUBE: Thank you. So, we have got general release,
3	MRS JUSTICE BACON: All right.	3	we have got affiliate releases for ricochet claims, we have
4	MS TOUBE: So, the point $-$ and this is, of course, why	4	got advisor releases, and we have got the contribution
5	the voting issue becomes what it becomes $-$ is there are lots	5	reduction. Now, the contribution reduction, it is, as we
6	and lots of creditors holding in lots and lots of different	6	say, a novel mechanism.
7	sorts of ways. So, paras.20 to 24 just set out the way in	7	MRS JUSTICE BACON: No, I understand it. It means the
8	which the WEIF was suspended.	8	point is that you do not want double counting, so insofar as
9	MRS JUSTICE BACON: Which led to the FCA investigation.	9	there is a contribution which then goes back against the
10	MS TOUBE: It did. So, the preliminary conclusions are	10	LFSL, against the company, that is reflected in the amount
11	set out in paras.25 to 27. 26 in particular is a summary,	11	available.
12	and 27 is the restitution that we have already seen.	12	MS TOUBE: That is right, and so it deals with that
13	Paragraphs 28 onwards are the litigation claims, and you	13	practical point, it deals with the ricochet point, and it
14	will have seen that most of these are for damages for breach	14	expressly allows Scheme Creditors to sue third parties . It
15	of the COLL Rules and breach of duty claims under 138D of	15	is just that, if they do, this is what then happens.
16	FSMA, and you will know that my learned friends say that	16	Paragraph 40 deals with the various definitions, and again,
17	makes them different sorts of creditors . We will come back	17	I was not proposing to take you to very much there, except
18	to that in a minute. Those claims have been said, in	18	for to point out that there are, in para.42, various people
19	correspondence, as we point out at 29.1, to be £300 million	19	who are outside the Scheme. None of that is relevant for
20	claims. So that was the point I was making to your Ladyship	20	today, and para.43, as we say, it is up to the company to be
21	earlier about these creditors may say, "Well, I have more	21	able to decide who is inside and who is outside the Scheme.
22	claims than the FCA has found that I do."	22	MRS JUSTICE BACON: Yes. Now, Scheme Creditor, is you
23	Paragraph 30 makes the point again that the claims are	23	para.44(1) still correct or has that now changed following
24	disputed by the company, and para.31 points out that there	24	the drafting amendments?
25	are also potential claims between LFSL and HL, Hargreaves	25	MS TOUBE: No, that is correct.
	41		43
1	Lansdown, and Depositary, and that is the third—party point	1	MRS JUSTICE BACON: So, this is correct. So, can we
2	to which we refer later, but it does not seem to be picked	2	just look at that to make sure (inaudible)?
3	up. It was picked up in correspondence but does not appear	3	MS TOUBE: Yes, just to make it clear, the Scheme Rules
4	in my learned friend's skeleton. Then we get the section	4	have changed very, very minimally, so anything which is a

5 about the settlement. We have already seen that. Then, the 6 sale of the company's business in para.34 onwards.

7 MRS JUSTICE BACON: And do you say that the sale was 8 concluded yesterday?

MS TOUBE: It was, yes. The bottom—line point on the sale is the one that we pull out in para.36, which is the total sum for the sale is £140 million, total sum due to the company is £80 million. So, that is where that comes in.

MRS JUSTICE BACON: And that is the sale price that 4 goes into the pot?

MS TOUBE: That is the sale price that goes into the pot, and the FCA has confirmed that it has received appropriate information that that is fair value. Then, we get into the Scheme itself at para.37, which summarises the Scheme. In terms of releases, we deal with those in para.38. There is no issue in relation to releases before your Ladyship, but just so you can see what they are, the first lot is a general release of the Company for Scheme Creditor claims.

MRS JUSTICE BACON: Yes, I have read that, and I have also read the corresponding section of Mr Midl's witness

MS TOUBE: Yes, just to make it clear, the Scheme Rules
have changed very, very minimally, so anything which is a
reference to the Scheme Rules is actually—— is right.
MRS JUSTICE BACON: So, 178, "or at which each person
who holds a Scheme Claim" and then "Scheme Claim or actual,
potential, alleged, present or disputed liabilities ." I
see. How do you identify people with potential liabilities ?
MS TOUBE: Well, they will be investors.

MRS JUSTICE BACON: So, would it—— This is probably a

very stupid question, but would it—— It seems a little bit going around the houses to define the Scheme Creditors by reference to liabilities, which then, in turn, is defined by reference to investors. Are you simply saying the

16 investors?

MS TOUBE: Well, we are saying those who have
post—suspension potential claims, remembering that the
pre—suspension liabilities are outside. So, you might have
an investor who had a pre—suspension claim and a
post—suspension claim. Pre—suspension claim is outside———

22 MRS JUSTICE BACON: Yes.

MS TOUBE: -- we are not are dealing with that.

 $24~{\hbox{\footnotesize Post-suspension claim inside, we are dealing with that.}}$

MRS JUSTICE BACON: All right. Well, assuming that

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1	this definition is adopted, is there any problem—— is there	1	of the trust assets, and so effectively the trust will stay,
2	issue taken by anyone with this definition, or was it a	2	and they will get that.
3	different definition that the problem———	3	MRS JUSTICE BACON: Yes.
4	MS TOUBE: I am not sure there was actually any issue	4	MS TOUBE: So, that is just to deal with a sort of
5	taken with any of the definitions, just that they were not	5	fallback eventuality, and then $sub-s.(13)$ is termination,
6	all the same.	6	and sub-s.(14), I suppose I should mention, which is the
7	MRS JUSTICE BACON: I see. So	7	role of the Scheme Supervisors, so they are going to deal
8	MR BOMPAS: My Lady, perhaps I can help my learned	8	with distribution and also the reserve. So, the company is
9	friend. There is, I think, a distinction between claims and	9	not dealing with that, that is Scheme Supervisors, and they
10	investments, and what is the subject of the Scheme is	10	are independent, as your Ladyship will have seen.
11	claims, not beneficial interests in units. In the	11	MRS JUSTICE BACON: Yes.
12	definition in the rules, in contrast with my learned	12	MS TOUBE: Then we go on in para.45 to the "Relevant
13	friend's skeleton, there is actually a reference to	13	Alternative."
14	beneficial interests in units, and what I think is intended	14	MRS JUSTICE BACON: Yes, and I think you have taken me
15	is that those who were entitled themselves to units	15	through a lot of that already.
16	indirectly as the beneficial owners through a trust	16	MS TOUBE: Yes, and your Ladyship already has the point
17	arrangement would be the folk who would then likely have	17	about the 50 million penalty.
18	claims, which claims are to be compromised as far as they	18	MRS JUSTICE BACON: Yes.
19	have been assigned or retained by the investors passed	19	MS TOUBE: And we have dealt with the FCA and the IC.
20	(inaudible).	20	So, this then takes us to s.E, which is "Issues for the
21	MRS JUSTICE BACON: Okay, but my short question was is	21	court at [this] hearing," which your Ladyship will be very
22	it said by anyone that this definition of Scheme Claim is	22	familiar with.
23	lacking in clarity so that people do not know whether they	23	MRS JUSTICE BACON: Yes.
24	are in or out?	24	MS TOUBE: First of all, "emphatically not" the merits,
25	MR BOMPAS: Not in the	25	as we always are required to say. Secondly, the question of
	45		47
1	MRS JUSTICE BACON: No.	1	class composition. Thirdly, the question of jurisdictional
2	MR BOMPAS: $$ actual definition in the rules.	2	block. I do not know if your Ladyship wants a definition of
3	MRS JUSTICE BACON: No, all right, and so the problem	3	"roadblock" at this point. You will have seen we have set
4	was the inconsistency between definitions, not	4	out the relevant passages or at least reference to the
5	MR BOMPAS: And the explanations for it.	5	relevant passages from the three cases.
6	MRS JUSTICE BACON: All right. Okay, which I think is	6	MRS JUSTICE BACON: And I am not sure that anyone is
7	being resolved. All right. Thank you. Just to let you	7	suggesting that there is one here.
8	know that perhaps in about five minutes we will take a	8	MS TOUBE: Well, the only point that is made in my

11 you mid-flow. 12 MS TOUBE: Thank you. That is very helpful. I suspect I will have got to class, and then I will stop. 13

submissions at an appropriate time. I do not want to stop

MRS JUSTICE BACON: All right.

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15 MS TOUBE: So, the Scheme terms as set out in para.44, 16

I was not, as I say, going to take you to any of those.

transcriber break, but you should just finish your

17 MRS JUSTICE BACON: No, that is fine.

 $\label{eq:mspose} \mbox{MS TOUBE: I suppose the only point that I should just}$

19 mention, although your Ladyship will have seen it, is in

2.0 44(12), which deals with the liquidation fallback if the

21 WEIF is dissolved. So, it may be that a time were to come

22 that the WEIF is dissolved and has to go into an insolvency

23 process for some reason or another, and so the question is

24 how does one deal with those people who are Scheme

2.5 Creditors? And the answer is that they will receive a share

have an opportunity to look at those authorities which we 16 17 cite that they are referred to as a factual legal 18 submission, which means that it is impossible to conceive of 19 circumstances in which the court would approve the Scheme at the sanction hearing. That is the way it is put in the $\ensuremath{\mathsf{Re}}$ 2.0 21 Morses Club Scheme Ltd [2023] EWHC 705 by Leech J. However,

learned friend's skeleton is a point about not making it

that when we talk about roadblocks. You will see if you

clear whether the reserve is or is not going to be used up

MRS JUSTICE BACON: And are you going to —— you going to

 $\ensuremath{\mathsf{MS}}$ TOUBE: Yes, but the only point I would make now is

22 in Re Noble Group Limited [2019] BCC 349, it is put as

23 whether there are other factors which would unquestionably

2.4 lead the court to refuse to exercise its discretion to

2.5 sanction the Scheme, and in Re Indah Kiat International

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and - -

come on to that later?

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MRS JUSTICE BACON: Well, perhaps when you speak----

MRS JUSTICE BACON: When you speak you can just—— and

UNKNOWN COUNSEL: -- or something else.

perhaps even now you should swivel that microphone in your

1	Finance Co BV [2016] B.C.C 418 the way that Snowden J, as he	1	direction.
2	then was, put it, was other issues which would	2	UNKNOWN COUNSEL: But if it is the live feed rather
3	unquestionably lead to the court declining to sanction the	3	than the shorthand writer, then that (inaudible) possible.
4	Scheme. So, that is a very high threshold, and although we	4	MRS JUSTICE BACON: Well, I do not
5	have not spelt this out expressly in the skeleton, this	5	UNKNOWN COUNSEL: I do not know how this has all bee
6	court does have jurisdiction to sanction the Scheme. It is	6	arranged, unfortunately.
7	an English company. It is a company that is liable to be	7	MRS JUSTICE BACON: Well, I do not either, so I think
8	wound up under the Insolvency Act, and it has a sufficient	8	perhaps you should just swivel that microphone in your
9	connection to the jurisdiction, and just for your note, that	9	direction.
10	test is set out in Re NN2 NewCo Ltd [2019] EWHC 1917 (Ch),	10	UNKNOWN COUNSEL: Okay. I hope I do not have to
11	which is in the bundle, which is in paras.27 to 28, which is	11	displace my learned friend to make my points.
12	in our authorities bundle at p.305. So, then we get to	12	MRS JUSTICE BACON: No. Also, I am told there is not a
13	para.56, which is the points the court should consider at	13	transcriber. I mistakenly thought that there was. Is it
14	the hearing. I am in your Ladyship's hand if you want me to	14	correct? Is there no transcriber, or do we have a
15	deal very briefly with notification before we break for	15	transcriber?
16	class.	16	CLERK OF THE COURT: They are doing it remotely I am
17	MRS JUSTICE BACON: Yes, why do not you do that? I	17	told.
18	think you can probably deal with that in a couple of	18	MRS JUSTICE BACON: I see. All right. Well, in that
19	minutes, and then we will get on to the class analysis.	19	case, if the shorthand writer then cannot hear you either,
20	MS TOUBE: Yes. So, the point is there is no specific	20	someone will tell us. Now, the other point of
21	notice period that is required. There has been four weeks.	21	administration is that I understand that Mr Pyatt would like
22	We have set out in paras.62 to 63 what the company has done.	22	a copy of the company's skeleton argument because he has not
23	It has gone to great lengths to inform the Creditors both	23	had it. Are you content for that to be provided by my clerk
24	directly and by advertisement. The test for notice is	24	directly to Mr Pyatt?
25	common ground with my learned friend, Mr Bompas, and the	25	MS TOUBE: Yes.
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		4	MDS HISTISE DAGON, All J. J. Ti
1	learned friends accept in their skeleton that the	1	MRS JUSTICE BACON: All right. Thank you very much.
2	requirements for notice have been made out. So, that is	2	So, I will hear you now on class composition.
3	really all I was going to say about the notification, which	3	MS TOUBE: Yes, the last point you asked me was the
4	is it is sufficient.	4	cross—reference to the point in para.64 about the Investor
5	MRS JUSTICE BACON: Yes, can you just give me the	5	Advocate.
6	reference to the Investor Advocate report point that you	6	MRS JUSTICE BACON: Yes.
7	make at para.64? Just the paragraph number will do.	7	MS TOUBE: That is bundle C, tab 28, p.1002, and it is
8	MS TOUBE: Can I give that to you just after we break?	8	para.7.1.2 of the report.
9	I know that is somewhere else in our bundle.	9	MRS JUSTICE BACON: Thank you very much.
10	MRS JUSTICE BACON: Yes, thank you. All right, let us	10	MS TOUBE: So, we set out the class analysis. The
11	break and then we will come to the class analysis at the	11	standard test. There is nothing between us here. We are
12	end.	12	looking at rights and not interests, and we are looking at,
13	(11.44 a.m.)	13	in terms of a class, the class being confined to persons
14	(Short break)	14	whose rights are not so dissimilar as to make it impossible
15	(11.52 a.m.)	15	for them to consult together with a view to their common
16	UNKNOWN COUNSEL: My Lady, before my learned friend	16	interest. So, as we point out in para.67, we are looking at
17	gets back, can I raise a small administrative problem?	17	two considerations. First of all, the rights that Creditors
18	MRS JUSTICE BACON: Yes.	18	would have if the Scheme were not implemented, sometimes we
19	UNKNOWN COUNSEL: I am told that I am inaudible on the	19	have got those rights in, and the rights that the Creditors
20	live feed. I do not know if my learned friend here will be	20	would have if the Scheme were implemented and sometimes we
2.1	audible on that or whether that is the microphone———	2.1	got those rights out, and that comes from Re Hawk Insurance

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Company Limited [2001] 2 BCLC 480 as we say in para.67, and

the way in which one looks at these and analyses them is, as

comparator. So, in other words, what would happen if the

we point out in para.68, to analyse the rights in the

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it is para.3.

Scheme were not to proceed? And we refer there to Re Port Finance Investment Ltd [2021] EWHC 378 (Ch), and I think it 2 MRS JUSTICE BACON: Yes. 3 is just worth looking at Port Finance briefly on this point. 3 MS TOUBE: Before we go to the point that your Ladyship 4 It is at tab 15 of our authorities bundle, p.372. It is 4 was making, which we will deal with in a moment, but if we paras.78 to 79. 5 5 go back to p.179 of that judgment, which is p.124 of the MRS JUSTICE BACON: Yes. bundle, you will see where the discussion starts about this 6 6 7 MS TOUBE: So, I just invite your Ladyship to read case, where Lord Millett is dealing with the various cases. 8 those two paragraphs 8 He sets out all the principles, and then he says: 9 MRS JUSTICE BACON: Yes. 9 "There is a notable degree of 10 1.0 MS TOUBE: So, the first point is that even if you do consistency in this line of authority. 11 have rights which are different from each other and those 11 The principle upon which the classes of 12 12 differences are material, you still do not necessarily have Creditors or members are to be constituted 13 separate classes, and the second point is the one that we 13 is that they should depend upon the 14 14 cited this for, which is you look at the comparator, and similarity or dissimilarity of their 15 that is important in this case because the comparator here 15 rights against the company and the way in 16 16 is insolvency, and the Scheme Creditors are all unsecured which those rights are affected by the 17 Scheme and not upon the similarity or 17 Creditors who in an insolvency would prove pari-passu with 18 18 dissimilarity of their private interests MRS JUSTICE BACON: And were—— in this, is there any 19 19 arising from matters extraneous to such 20 2.0 rights." point made about rights as against the company rather than MRS JUSTICE BACON: Yes. 2.1 rights as against third parties? 21 MS TOUBE: And then, to make that good in that case, we 2.2 MS TOUBE: I am sorry. I do not understand. 22 MRS JUSTICE BACON: Does this authority refer to the 2.3 2.3 go to p.130 of the bundle, so p.185 of the report and that 2.4 2.4 relevant rights being rights as against the company or under deals with the application to the facts of the present case. the Scheme rather than rights of---and this is the point which your Ladyship was mentioning to

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1 MS TOUBE: It does not. I do not think, use the words "Against the company." I think we actually did a search for 2. 3 every case where it said, "Against the company," and it used to be spelled out in the practice statement, but then the 5 practice statement started to apply to para.26A Schemes as well where it does not have to be a creditor, it can be a 6 7 person with rights that are affected, and so that wording 8 fell out of the practice statement. So, a lot of the times 9 when you find it in a case, it is a direct quotation from 10 the practice statement itself, but I am going to take you to 11 at least those cases which I think are particularly helpful, 12 which do use the phrase "Rights against the company." The 13 reality is that it is very rare for someone to run with this 14 point because it is absolutely clear that it is rights 15 against the company, so there are not that many cases that 16 deal with this issue. Apcoa is one of those cases, which is why we put it in the bundle. So, para.69, we refer to UDL, 17 18 and it is useful to go to UDL here. That is in tab 5 of the 19 bundle. The first paragraph we referred to in our skeleton was para.16--I am sorry, p.184, which we set out there, and 2.0 21 you will see there the phrase "Against the company" is 2.2 expressly used there. 23 MRS JUSTICE BACON: Page 184 of the UDL, but page what

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MS TOUBE: It is p.129 of the bundle, and you will see

us earlier, and this deals with the position of the 2. preferential Creditors, as you will see, and at G some of 3 those former employees had preferential claims and a special interest in opposing the Schemes not shared by other 5 Creditors, including other preferential Creditors of any or not such employees, and that special interest was the ex 6 7 gratia payments out of the protection of wages on insolvency fund, which entitles the board by way of subrogation to 8 9 payments by the liquidator, and so effectively the board 10 pays out, and that is not dissimilar from the FSCS in the 11 present case, and what does the court say in relation to 12 that over the page? At B, "This is, however, exactly the 13 kind of private interest not deriving from any legal right 14 against the company, which may properly influence the creditor to vote against the Scheme, but which does not 15 16 entitle him to demand a separate meeting of himself and others in a similar position," and then the point is made 17 18 "Otherwise, there would be a right of veto." 19 MRS JUSTICE BACON: Is that a good analogy, or is it a 2.0 flawed analogy? 21 MS TOUBE: Well, what it makes the point about is two 2.2 things. First of all, it says what you are looking at is

rights against the company - rights against somebody else

are just interests - and, secondly, the actual example in

that case in Hong Kong was of a claim that could be made

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against a third party who would then pay out and then subrogate in, which is similar in type to the FSCS position. 2 3 MRS JUSTICE BACON: Yes. 4 MS TOURE: So----MRS JUSTICE BACON: And I think the point being made 5 here is that there are different classes of rights, some of 6 7 which carry with them the FSCS backup, if you like, and some 8 of which do not, i.e. the tortious claims, that is what is 9 10 MS TOUBE: Yes, so what is said is two things. The 11 first thing that is said is there are two different sorts of 12 claims. There are claims which are, so say my learned 13 friends, really good claims, based on 138D, and claims which 14 are tort claims, which are less good claims. The other 15 thing that they say is that the claims which are the 138 claims are backed by the FSCS and the others are not. 16 17 MRS JUSTICE BACON: Yes, well, leaving aside the good 18 and the not so good claims, I think that the key point being 19 made is the backed by the FSCS, so it is difference in quality. That is what is being said. 20 2.1 MS TOUBE: Yes. MRS JUSTICE BACON: And that seemed to me somewhat 2.2 2.3 similar to the position being canvassed here with 2.4 employees -- well, with some Creditors who were employees as

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opposed to other Creditors who were not employees, and the

1 employees would then have possible \boldsymbol{X} greater payments from the third party which the non-employees would not. MS TOUBE: Yes, and so what we say is that the way you look at this is you should say, "What are the rights against 5 the company?" The rights against the company are all the same between the retail investors and the institutional investors, but retail investors may also have a claim 8 against somebody else. As a matter of Scheme principles, that is an interest and not a right, and you do not make it 10 into a different right against the company by saying, "I am bolting on a right against somebody else to make my right against the company different."

MRS JUSTICE BACON: Is there any definition of interest 13 as opposed to right? 14

15 MS TOUBE: Well, there are a number of cases.

MRS JUSTICE BACON: Are you going to come onto those?

MS TOUBE: I will. There are cases in which somebody 17

18 says, for example—— there are all sorts of things that one 19

looks at to see whether they are rights or interests . So, 2.0 for example, if someone has a cross-holding between classes,

2.1 that is an interest, not a right. If somebody is getting a

2.2 fee, that may be either an interest or it may be a right

that does not factor the class. So, there are lots of cases 23

2.4 about these different sorts of things, but all of those

things are rights against the company. They have got to be

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a right against the company to be a right in the first place. If they are not a right against a company, they 3 cannot be anything more than an interest.

MRS JUSTICE BACON: Yes.

MS TOUBE: So it is for that reason we say that the principles that my learned friend set out in their skeleton 6 about how one works out classes are right, except that they miss out the phrase "Rights against the company," and I will come back to a few more cases where we look at that in a 10 minute, but first of all let us just look at what are the cases, and we set that out in para.70 of our skeleton. So, 12 the first point is, and I think it is worth making this point, in many Scheme cases there are lock-up agreements with the Creditors, so you know how they are going to vote, and sometimes what is said is "Oh, well, you are trying to constitute at your class so that you can get it passed or vetoed or all the rest of it." We do not have a lock-up 18 agreement; we do not know how anyone is going to vote.

So, this is not a case where we have decided to constitute a class in order to get the vote we want. We actually have no idea, so what we have done is we have gone by a matter of legal principles and said, "Well, what are the principles here?" So, para.71, what about the rights in? The rights in are materially the same. We start by looking at the rights in the relevant alternative. All of

1 these Creditors are unsecured Creditors with rights that rank pari-passu, and in subpara.3 it does not matter that 2. 3 some of the Scheme Creditors have different claims from each other, as long as they are all unsecured which they are, and 5 your Ladyship will see that from the quotations which we set out from Re Cimolai Spa & Ors [2023] EWHC 1819 (Ch) and from 6 7 Noble in subpara.3 and 4, and if your Ladyship has not had an opportunity to look at those paragraphs, that would be 8 9 helpful to do so now. 10 MRS JUSTICE BACON: No, I have. 11

MS TOUBE: Thank you. So, you will have seen that what is said by Trower J in Cimolai and by Snowden J in Noble is it does not matter if you have got different claims and somebody might have better claims or somebody might be disputed, the essential question is what would happen if they proved him in insolvency? And the answer is they had be unsecure Creditors, and that is the position here. So my learned friends accept, in their skeleton argument at para.15, that obviously different investors will have claims against Link of different values and different legal bases so that, as contingent Creditors of Link, what each is giving up under the Scheme will differ. So, they accept that they are all contingent Creditors, and that is correct to accept that. So, what you have got is people with

different claims, but they are all provable and just looking 60

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2 MRS JUSTICE BACON: Yes, this is your point about the 3 good and the bad claims? The fact that some claims might 4 have a better prospect of succeeding does not need to be a 5 separate class constitution. MS TOUBE: Exactly right, and you will notice in both 6 7 paras.98 and 100, the phrasing, "Rights against the company" is used because that is what the court is looking at. 8 9 MRS JUSTICE BACON: Yes. 10 MS TOUBE: Then in subpara.5 we deal with the argument 11 that was made in correspondence but is not made in my 12 learned friend's skeleton as to potential claims that could 13 be made. I am sorry, this argument is made: the asserted 14 distinction between institutional and retail investors. So, 15 the first point we make is the one I have already made, 16 which is that retail investors might have different claims from institutional investors, but they also both have causes 17 18 of action, and that is accepted by my learned friends in 19 para.27 of their skeleton, where they say: 2.0 "Institutional investors, by 2.1 contrast, have no claim pursuant to 138D; 22 they are limited to a claim for a 2.3 professional negligence against Link in 2.4 tort ' Which they say is more difficult, and then they make

at Noble as we are here, you will see in para.98---

the same point in para.32. So they accept that there are claims in each of these. They are, as we say, all pari-passu on secured claims.

4 So, let me come back to the question of rights against 5 third parties, mostly because I have just got that somewhere else in my script, but that is rights in. Rights out, we 6 7 deal with in para.72. The rights out are again the same. 8 So, all of the Creditors are being treated in the same way. 9 That is important, because I will come back to that in the 10 context of Re Cape Plc and others [2006] EWHC 1316 (Ch), 11 which my learned friends rely on. Paragraph 73, that is the 12 point that I was starting to mention earlier, which is 13 potential claims that some Scheme Creditors might have 14 against other third parties. I do not think my learned 15 friends are pursuing that, but just to close it off, it does 16 not give rise to a class issue either.

17 MRS JUSTICE BACON: I can see your point that if you 18 have a completely separate claim against a third party, 19 which this seems to be addressing the claims against HL, that is not a right against the company, but what is the 2.0 2.1 position if you have a right as against the company, which 2.2 has -- or different classes of rights against the company, 23 which carry with them different consequences for third party 24 rights. So, this is not a third party right that is 2.5 divorced in some way from the rights against the company.

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What is being said is that if you have a s.138D right

against the company, that carries with it, inevitably, a

3 right under the FCSC Compensation Scheme, leaving aside the

questions for eligibility , but that is part and parcel of the package, which is different from a situation where you

have, say, a tortious right which does not carry with it the 6 7

potential claim under FCSC.

8 MS TOUBE: Yes. I will come back to that in the 9 conference about Apcoa if I may?

10 MRS JUSTICE BACON: All right.

11 MS TOUBE: But just to jump ahead myself a little bit, 12 in Apcoa what there was was there was a Turnover Agreement 13 between various Creditors to which the company was a party, 14 which depended on what was going to happen under the Scheme 15 and how it got worked out and all the rest of it, and the 16 court said:

17 "Well, the turnover right is behind 18 the curtain. That's an interest. That's 19 not a right against the company. The 2.0 right against the company is only the 21 rights in, so what rights do you have 22 against the company coming in, and what 23 are the rights under the Scheme? What are 2.4 the rights coming out?" 2.5 So, a right which is parasitic on it, so a turnover

1 right, for instance, is something that is happening outside 2.

3 MRS JUSTICE BACON: But was that a right that was parasitic upon one of the rights against the company?

5 MS TOUBE: Well, yes, because it was only a turnover, 6 depending on what happened under the Scheme. So depending 7 on what happened between A and the company, B and the 8 company had B's rights, but A and B then had to do things 9 with each other; that is not a right against the company.

and that does not cause a class issue.

MRS JUSTICE BACON: All right, so is that the closest-I mean, I was wondering whether the UDL case was a similar case, but it is not clear from the short description whether the ex-gratia payments were parasitic upon particular rights, save to the extent that it was employees versus non-employees? MS TOUBE: I do not know any more than what is in the

17 18 authority itself.

MRS JUSTICE BACON: Yes.

MS TOUBE: But what it was in UDL was an additional 2.0 21 right to be paid by somebody else, which came automatically 2.2 if you were established to be an employee.

23 MRS JUSTICE BACON: Yes, so the relevant trigger was 2.4 whether you were an employee as a class of person rather 2.5

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than the type of right that you had against to claim?

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MS TOUBE: Well, yes, except you had to have a right 1 categories of rights against the company, such as common law 2 against the company with parasitic on it. rights and statutory rights, which carry different 3 MRS JUSTICE BACON: Yes. I see. So, if you had an 3 consequences, is that something that the court could 4 employee-related claim because you were employed, then you 4 legitimately take into account? MS TOUBE: It depends what the relevant alternative is. 5 could expect to receive the ex-gratia payment; if you had a 5 non-employee-related claim, you could not expect to receive So, if the relevant alternative is insolvency and whatever 6 6 7 that? So I suppose that is quite similar. 7 the claims are are just unsecured claims which would be 8 MS TOUBE: Yes, it----8 provable in an insolvency, as they are here, then the fact 9 MRS JUSTICE BACON: Yes. All right. 9 that some of them are in tort and some of them are in 10 10 MS TOUBE: We will come back to Cape because my learned statute does not make any difference at all. So the classic friends rely on Cape, and say, "Oh, well, in Cape, there's a 11 11 difference would be between secured and unsecured Creditors difference between the FSCS group and the non-FSCS group," 12 MRS JUSTICE BACON: Yes, so, on insolvency, everyone's 12 13 but as we will see when we get there, that is because the 13 rights will be the same because they are all unsecured, that rights under the Scheme were different. So they were 14 14 is your point? 15 treated differently under the Scheme, so the rights out were 15 MS TOUBE: Yes. MRS JUSTICE BACON: I see. All right, I understand. different 16 16 17 MRS JUSTICE BACON: I see. All right. 17 MS TOUBE: Again, I am not sure whether it is going to 18 MS TOUBE: So, the question that the court has to deal 18 take you much further forward, but just one of the other 19 with in relation to one class is to work out whether the 19 cases that is in the bundle at Tab 20, which is the Re rights are -- Even if there were different rights, which we Castle Trust Direct Plc [2021] 2 BCLC 523, which is the case 20 20 21 say there are not, whether they are so dissimilar so that 21 we normally look at to work out how to hold virtual 2.2 the Creditors cannot consult together and we just point out 2.2 meetings. This is at p.471 of the bundle at para.38 what Sir Alastair Norris has said in the Re All Scheme Ltd. 2.3 MRS JUSTICE BACON: Yes. 2.3 2.4 [2021] EWHC 1002 (Ch), which is the question about whether 2.4 MS TOUBE: Here, Trower J is looking at the meaning of or not all Creditors might have in common the fact that they 2.5 the word, "meeting," and in that context, he says: "It has to be construed in the 1 want to be paid-- get a better outcome. So, even if we got 1 2. to the point, which we do not, that these were different 2 context of the purpose for which it's 3 rights, the rights would not be so dissimilar that the 3 used. The purposes is the mechanism by parties cannot consult together but, as I say, we do not get which Creditors are able to come together 5 there in the first place, so we are in a one-class 5 and consult with each other should they 6 choose to do so in order to make a 6 7 7 Now, then we go on to look with things that might be collective decision on the rearrangement 8 8 said to split the class. Paragraphs 77 to 79 deal with the or compromise of their rights against the 9 9 different types of shares; nobody is suggesting that splits company. 10 the class. Then we deal with the FSCS conversation points. 10 So, again, that is the classic terminology, "rights 11 against the company," and your Ladyship will have seen that

So, coming back to the point we have just been looking at, we can start, I think, with Gategroup, which your Ladyship has had an opportunity to look at, I think you said ----MRS JUSTICE BACON: Yes. MS TOUBE: -- which is at Tab 19 of the authorities bundle and at p.458 and it is para.183(3).

MRS JUSTICE BACON: Yes, that is the paragraph that I 17 18 looked at.

19 MS TOUBE: You will have seen, just further up in that 2.0 same paragraph, subpara.1:

21 "The Creditors' rights that fall to be considered are 2.2 both their existing rights against the company and the 23 rights conferred by the Scheme or the plan.'

2.4 So again, that phrase is used.

MRS JUSTICE BACON: But if there are different

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got p.814 in the bundle? 2.2 MRS JUSTICE BACON: Yes. 23 MS TOUBE: So, if you do, you will see paras.50 and 51.

2.4 This is Hildyard J in Apcoa, and you will see the heading,

the reason for not proliferating classes is to avoid giving a monology of veto. That is why we are looking at rights

and not Creditors. So, then I think it does make sense to

look at Apcoa, which we added at the end of the bundle at

Tab 33. I think that was sent over to my learned friends

separately, but I hope your Ladyship has it at the end of

MS TOUBE: So, I was going to look at -- If you have

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MRS JUSTICE BACON: Well, let us see.

2.5 "Distinguishing rights from interests," which I think was

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your bundle.

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1	the question that your Ladyship was asking me?	1	here, they ended up with fewer rights?
2	MRS JUSTICE BACON: Yes.	2	MS TOUBE: Yes, where they received something which
3	MS TOUBE: Can I just invite you just to look at	3	actually belonged to another person, they had to pass it
4	paras.50 and 51?	4	over———
5	MRS JUSTICE BACON: Well, yes, but then he goes on and	5	MRS JUSTICE BACON: Yes.
6	talks about interest in the sense of personal or extraneous	6	MS TOUBE: and what was being said was, well,
7	interest, or subjective motivation, but that is not what we	7	because the companies are parties to this and because it is
8	are dealing with here.	8	affecting what everybody is ultimately getting from the
9	MS TOUBE: No, but you will see what he deals—— what he	9	company, this is rights against the company, and the answer
10	goes on to look at and this particular case is the Turnover	10	is no, this is something that is happening between the
11	Agreement, and you can see this—— if we go back to p.817,	11	Creditors behind the curtain, as the judge puts it.
12	this is at para.68.	12	MRS JUSTICE BACON: Where is that?
13	MRS JUSTICE BACON: Yes.	13	MS TOUBE: You see in para.92, second line.
14	MS TOUBE: You will see that Mr Snowden, who was	14	MRS JUSTICE BACON: All right.
15	counsel bearer, advanced various principal points in	15	MS TOUBE: So, there is a change of rights between two
16	relation to class composition, and you will see that it	16	Creditors, but not a change of rights between the company,
17	related to the Turnover Agreement.	17	and that is the closest thing we can find to something which
18	MRS JUSTICE BACON: Yes, and then para.4, these	18	deals with non-rights against the company.
19	differences of rights or, at the least, differences in	19	MRS JUSTICE BACON: Yes.
20	interests proceeding from rights———	20	MS TOUBE: So, what are the cases that my learned
21	MS TOUBE: Yes.	21	friend relies on? Well, the first case that they rely on is
22	MRS JUSTICE BACON: and I think that is what is been	22	Re Sunbird Business Services Limited [2020] EWHC 2860 (Ch).
23	said here.	23	That is in my learned friends' authority bundle at Tab 6, p
24	MS TOUBE: Yes, because what was trying to happen in	24	99.
25	that case was the right against a third party was trying to	25	MRS JUSTICE BACON: Yes.
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1	be turned into a right against the company because the	1	MS TOUBE: And my learned friends rely on what Snowde
2	company was a party to the Turnover Agreement.	2	LJ said in para.23, and in particular that he talks about
3	MRS JUSTICE BACON: Yes.	3	looking at the Scheme in the context of the restructuring as
4	MS TOUBE: And the court then deals with the Turnover	4	a whole. Now, of course, that is right; one does look at
5	Agreement at paras.72 to 83, which starts at p.818 of the	5	the Scheme in the context of a restructuring as a whole,
6	bundle, and I would invite your Ladyship to read this, but I	6	including any rights conferred in other agreements, but
7	should caveat it by saying, as the court says, it is not	7	these are still rights against the company, not rights
8	terribly clear what the Turnover Agreement actually was	8	against third parties . We can see that from Sunbird itself.
9	doing, but what was clear was that one set of Creditors has	9	If we go back to p.97 of the bundle at paras.11 to 14, we
10	an obligation to turnover to another. So, if I could just	10	can see what the problem was in that case, and just to say,
11	ask you to look at paragraphs———	11	if your Ladyship reading all of that.
12	MRS JUSTICE BACON: What, sorry, one set of Creditors?	12	MRS JUSTICE BACON: So, paragraph?
13	MS TOUBE: Had to turnover certain receipts to another.	13	MS TOUBE: 11 to 14. We had one Scheme Creditor, 21s
14	You will see this from paras.72 to 83.	14	Century, which had rights against another company, as well
15	MRS JUSTICE BACON: Well, I cannot even begin to	15	as the company, but that was not what gave it a different
16	understand what is being said in those paragraphs, but———	16	class statement. What happened was that the company had

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MS TOUBE: Well, the good news is that you do not

really have to, because if we turn to para.90, which is on

point to your Ladyship. He says, "I've no idea what this is

really doing," but what it was not doing was affecting the

rights against the company. If you look at paras.90 to 93.

MRS JUSTICE BACON: All right, so the consenting

lenders had to turnover to the SSFA lenders any rights which

they got, and it is kind of the reverse of what is happening

 $p.825 \ \text{of the bundle, the judge reaches a similar \ sort \ of}$

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ended into a deed of novation, conditional on the new Scheme

company, SBSAL, was novated and assumed by the company and

MS TOUBE: Now, those rights against the company were

converted into shares in the company. So, what you had was

not being conferred under the Scheme, but they were being

conferred under the deed of novation, which was part of the

being sanctioned, under which the debt owed by that other

rights against the company in virtue of the novation.

MRS JUSTICE BACON: Yes.

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wider restructuring so that that creditor got different rights out, and we can see that by para.14, the very end of 3 that, that creditor was being offered a materially different 4 and a more advantageous deal. So the rights are not all different. Yes, so it is in that context that the court is 5 considering the question of wider rights, still rights 6 7 against the company but outside the Scheme, and in para.24, which is, I think, at p.100 of the bundle, the court said 8 9 that the deal of novation rights should be taken into 10 account as well, and then in para.25 the court concluded that there was a material difference in rights out onto the 11 12 Scheme - in other words, rights against the company - as a 13 result of the wider restructuring. 14

Then the court goes on to consider, at paras.26 to 32, whether the class was fractured, and Snowden LJ said, no, commercial interests were aligned. You do not need to look at that, I think, because obviously all the case turns on its own facts, but Sunbird is not saying one looks at rights against the third parties. What it is saying is one looks at rights against the company, but outside the four corners of the Scheme. So, Sunbird does not take my learned friends anywhere.

Then we get to the other case upon which my learned friends rely, which is Cape, and they draw attention to the only relevant passages of that bundle, which is at p.13 of

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the bundle, paras.23 to 26. So para.23 is the point that I
was making to your Ladyship earlier, which is that Cape
proposed that the Creditors should be divided into two
classes, recall Scheme Creditors and general Scheme
Creditors, and paras.24 and 25 explain why, and you will
see, in particular, from the beginning of para.24 and the
beginning of para.25, that the provisions of the Scheme
distinguished those claimants for whom there was insurance

10 MRS JUSTICE BACON: Yes.

cover from others.

MS TOUBE: So, in that case, they were different rights out under the Scheme, so it is perhaps unsurprising that those rights against the company and the other rights under the Scheme were treated differently. So, Cape does not assist my learned friends either, because that is a difference in rights out case.

MRS JUSTICE BACON: Yes.

MS TOUBE: So, that is why we say there is only one class. That is why we say the only rights are the rights against the company, anything else is interests, and that is why we say that there is no other reason for there to be two classes ordered. So, that is really all I had to say about class. Unless your Ladyship had any other questions, I was going to finish my submissions.

MRS JUSTICE BACON: No.

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MS TOUBE: So, at para.85 of our skeleton we deal with 2 the proposed directions. The timetable we set out in 3 para.86, you will have seen my learned friends suggest that 4 they would quite like that timetable to be pushed back. Obviously, it is a matter, really, for your Ladyship when the Scheme meeting should be held and when the sanction 7 hearing should take place, but as I said earlier, our aim is 8 to get this Scheme sanctioned and money out as soon as possible. 9 10 MRS JUSTICE BACON: Well, I think we will probably have to see where we are on Thursday morning for that. 11 12 MS TOUBE: Understood, and, effectively, I cannot say 13 to a leadership that there is — unlike in some Scheme cases. there is no drop-dead date that this has to happen. It is 14 15 just we would quite like Scheme Creditors to have an 16 opportunity to vote and get money out as soon as possible. 17 Paragraphs 88 to 90 deal with the virtual meetings point. 18 Just to deal with one point there, again, it is a matter for 19 your Ladyship, but my learned friends have suggested that we should also have a physical meeting because some Creditors 20 2.1 may struggle with virtual meetings. We have proposed also 22 that there should be telephone access, so those who do not 2.3 have internet access should be able to phone in. The 2.4 problem that we foresee with a physical meeting is that we would have to have a building that was big enough for

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2 250,000 Scheme Creditors all to turn up should they so wish.

MRS JUSTICE BACON: Well, you are not going to have all

of them turning up.

MS TOUBE: Well, yes, we would assume not, but if we

5 had a place that was not big enough for all of them to fit
6 in, that would be a problem. So we would rather not spend
7 the Scheme Creditors' money on having a physical building
8 either that nobody turns up to or is not big enough and
9 everyone has to squash in, but again, if the court were to
10 think that it is appropriate to have a physical meeting, we
11 would have one.

MS TOUBE: Yes, sorry, that is what I had in mind.

MRS JUSTICE BACON: But are you proposing a hybrid

MRS JUSTICE BACON: But what about a hybrid meeting?

meeting in any event?
 MS TOUBE: No, we are proposing a virtual meeting.

MS TOUBE: No, we are proposing a virtual meeting. MRS JUSTICE BACON: I see.

 $\begin{array}{ccc} \text{MS TOUBE:} & \text{My learned friends are suggesting a hybrid} \\ \text{19} & \text{meeting.} & \text{We are saying the problem with a hybrid meeting is} \\ \end{array}$

20 that we would not know how many of those people were going 21 to turn up in person, so we would have to have a very, very

22 large physical premises for those who were going to turn up.

MRS JUSTICE BACON: Yes. Well, you could do it hybrid with only those who submit a particular reason for needing a

25 physical access to attend, as in somebody who simply is

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1 unable to use a computer or telephone as you are proposing. 2 MS TOUBE: Anything that makes practical sense we would 3 be happy to do. We just are trying to avoid running up 4 costs, obviously, so yes. We could certainly do that. The 5 other question would be where that would be. So, if it is to be a physical building at all, it would make sense to 6 7 have it in London.

MRS JUSTICE BACON: Well, perhaps in the short adjournment we might discuss with $-\ I$ think it is Mr Bompas and Mr Pyatt - whether you can agree the terms for a hybrid meeting. I think it would be sensible to have some premises so that somebody who submits a specific reason for not being able to manage a virtual meeting can turn up, but I do not think that it needs to be somewhere with space for thousands of attendees

MS TOUBE: Well, that is very helpful. We will certainly discuss that over the short adjournment. I was proposing to leave for now, until my learned friends have had an opportunity to look at the schedule, the methodology for voting and whether we can sort that out in a sensible

MRS JUSTICE BACON: Yes. Okay. And that is all the 2.2 2.3 things on the schedule?

2.4 MS TOUBE: That is. There are a few things at the beginning of the schedule which just say we have cleaned up

- 1 the Scheme Creditor, but it is most of the stuff. Then, 2. paras.92 to 98 deal with the explanatory statement, which 3 you will have seen that the court needs to be satisfied . No point is taken on that by my learned friend, Mr Bompas, and his clients. I do not know if anyone else does. Then we deal at the end with a potential roadblock. We say that 6 there is not one for various reasons. The only suggestion 8 that is made, as I said, by my learned friends, is that the question of whether the reserve might run out. This is a
- point that is made in paras.38 to 42 of their skeleton. 11 MRS JUSTICE BACON: Yes.

MS TOUBE: We say, well, we make it clear what the minimum is and that there might not be a second distribution. So, it is difficult to see what further points we could make on that. We do not yet know by definition whether the reserve will or will not be exhausted and therefore whether there will or will not be a second payment. So, as long as we make it clear that there might be and it would be up to this, but we do not know yet, we think that that is clear

21 MRS JUSTICE BACON: Well, can I just look and see what 2.2 his objection is? You said it is at 41. Have you really answered that by saying, "Well, we do not know what claims 23 2.4 will be made"?

MS TOUBE: Well----

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MRS JUSTICE BACON: Because I think their point is, well, that reserve may not be big enough and what then 2 3 happens if the reserve is exhausted? MS TOUBE: Well, that was the point that I showed your 4 Ladyship earlier, which is that if it got to a point where 5 the reserve is exhausted and there are further claims made 6 7 against the company and the company is put into liquidation, 8 then we have put in place a mechanism for what happens to 9 the Scheme Creditors in relation to payments out of the 10 trust. So, there is a liquidation mechanism which we have 11 built in. 12 MRS JUSTICE BACON: That is talking about WEIF 13 liquidation, but this is making a different point, I think, about the reserve being exhausted. I am not sure your point 14 15 about the WEIF liquidation addresses that. 16 MS TOUBE: Yes. What we're saving is that there are 17 claims outside the Scheme. If the reserve is not sufficient 18 to meet the facts for which it is supposed to meet, and if 19 it is exceeded, so that there are then claims against the company, or alternatively, there are other claims against 20 2.1 the company, and the company is put into liquidation, then 2.2 we have set in place a mechanism for liquidation of effectively what is left, which is the settlement trust 2.3

liquidation. The trust would be distributed to the Scheme

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MRS JUSTICE BACON: Are you saying there is no effect 2 3 on the trust fund?

under the scheme. So the company would be put into

MS TOUBE: Yes.

MRS JUSTICE BACON: All right. So your position is, 5 whatever happens to the reserve, which might in an extreme 6 7 case result in the company being liquidated if the claims 8 made against it exceed the reserve, that would not impact on 9 the trust fund. Okav.

10 MS TOUBE: There is just one final point which I should 11 have mentioned in relation to the explanatory statement. My 12 learned friends wanted to say that they think it is adequate 13 for now but want to reserve their rights to argue later if there is anything inadequate. That is a pretty high 14 15 threshold, but the practice statement itself makes clear at 16 para.15 that the adequacy of the explanatory statement can 17 be raised again at the sanction hearing, so that is already 18 dealt with in the practice statement.

MRS JUSTICE BACON: Well, it is and so there is no bar to them raising it again at the sanction hearing, but it seemed to me rather undesirable that if there is a point to be taken, that it should be held over to the sanction

2.2 23 hearing, so I wondered. Yes. I am not very enthusiastic

2.4 about everybody being here today, at no doubt vast expense,

2.5 and then someone coming along and saying, "Well, we want to

there is something new that comes up between now and the 3 sanction hearing, that will be considered at a sanction hearing, but if there is something that can be considered 4 now. I would like to consider it now. 5 MS TOUBE: Well, my Lady, we hear that, and that is a 6 7 matter for my learned friends. No doubt what will be said 8 is that they got the papers on Friday. 9 MRS JUSTICE BACON: All right. 10 MS TOUBE: So, my Lady, unless you have any further 11 points for me, I do not have any further submissions. 12 MRS JUSTICE BACON: No. Thank you very much. All 13 right. So. FCA. 14 SUBMISSIONS by Mr SMITH 15 MR SMITH: Thank you very much, my Lady. As my learned friend mentions, the FCA supports the Scheme, my Lady. In 16 particular the FCA, considers that the Scheme offers Scheme 17 18 Creditors the best and quickest opportunity to obtain a 19 better outcome than the alternatives that are available, and we think it is in Scheme Creditors interest that they be 2.0 2.1 given the chance to consider the Scheme and to vote on it. 2.2 My Lady, just by way of context for that petition - and your 2.3 Ladyship will have picked a lot of this up from the evidence 2.4 and skeleton arguments already — as your Ladyship will have

have a bit more of a think about it." I mean, obviously if

seen, in June 2019, the FCA notified the company that it was

commencing an investigation.

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MRS JUSTICE BACON: Yes. Well, I have read all that, so do you want to just pick up anything that is not in your skeleton argument?

MR SMITH: Yes. Of course, so in that case, I mean, unless your Ladyship has got any questions about the restitution or anything, I am happy—— from the FCA's position, I am happy if they have to leave that as read. Your Ladyship will obviously understand how that would work. and the relevant alternative and so on and so forth. So, unless your Ladyship has got any questions about that process and the reasons why we have come to the view in which we have, I think I can just get straight on to the class point.

MRS JUSTICE BACON: Yes. I mean, I think the question that I had earlier was about how the FSCS compensation mechanism worked and whether that required a claim, a separate claim, or whether that followed from the FCA investigation. Do you have a position on that?

MR SMITH: Well, so far as that is concerned, there is obviously a number of steps that would have to happen. So. let us assume the Scheme did not take place, then the first step is the FCA would have to go to the Regulatory Decisions Committee. That would presumably take the decision to issue

the Warning Notice. Then, the company would have the

1 ability to go back to the Regulatory Decisions Committee to make submissions too. 2

3 MRS JUSTICE BACON: Yes. Well, we have read all that 4 and it goes through and results in a decision by the upper 5 tribunal.

MR SMITH: Yes. So, let us assume we get to the

7 position where we have got an order at the s.384 from the 8 upper tribunal, then at that point that is something that we 9 consider could be presented to the FSCS by a claimant and 10 they could say, "Well, actually we have got this claim and 11 order in our favour. Please pay out on that." We don't see 12 any difficulty with that, but then it would be a matter then 13 for the FSCS to decide whether or not that claim was 14 compliant with the FSCS's own rules, and so far as we are 15 concerned that is a matter for the FSCS. They, I think as 16 can see from the correspondence, have not expressed a view 17 on that, and not taking the position on that at present. 18

MRS JUSTICE BACON: All right.

19 MR SMITH: So, unless your Ladyship has got any further 20 questions about the acquisition process and so on and so 2.1 forth, I will take that as read in the skeleton argument.

MRS JUSTIC BACON: Yes. 22

2.3 MR SMITH: So, my Lady, the only question I wanted to 2.4 address very quickly then is the question of class composition. It is obviously a matter of the company

1 primarily to formulate the classes. Having said that, the 2. FCA, having looked at the arguments that have been put 3 forward on both sides, agrees with the position advanced by the company. As your Ladyship noted, there are two aspects 5 to the class, and that is this question. You need to look 6 both at the existing rights, and also the rights which are 7 conferred by the Scheme. The focus, obviously, for the 8 present purpose is on the question of existing $\mbox{ rights}\,.$ We 9 agree with the company that that test is based on rights 10 against the Scheme company and not rights against third 11 parties, so we would agree that rights against the FCS, 12 which is a third party, fall out of the account for class

13 analysis purposes. 14 We would accept and indeed submit that they may well be 15 relevant for fairness purposes when you come to the sanction 16 hearing, and you are looking at the question of how 17 substantively the Scheme treats individual investors, but 18 they are not relevant, in our submission, for the purposes

of class analysis. My learned friend took you to a number

2.0 of cases. I am not going to go back to any of those. Your

21 Ladyship might just find it helpful to look at Hawk as well.

2.2 It's in the authorities bundle, tab 3, p.32. As your

23 Ladyship will know, this is the leading Court of Appeal

2.4 authority on the question of class analysis. If your

2.5 Ladyship goes to para.42, p.76, in the judgment of Chadwick

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LJ, it is in our submission quite helpful to pick up what he said in para.42, and then is elaborated on paras.43 to 44. MRS JUSTICE BACON: Sorry. Which page of the bundle? MR SMITH: Page 76 of the bundle, para.42. Where he said this:

> "It is to my mind essential to have regard to the fact that the Scheme is proposed as an alternative to winding up. There's no doubt that the company is insolvent. It has presented a petition for winding up and the court has appointed a provisional liquidator. The right approach in those circumstances, it seems to me, is to consider the position on the basis of the relevant rights of those which the creditors would have in a winding up.

Obviously, he means there a winding up of the Scheme company, as he then goes on to explain in paras.43 to 44. So, in my submission, it is quite clear that where the alternative to the Scheme is an insolvency proceeding, as it is in this case on the hypothesis that we would be successful in getting an order from the Upper Tribunal, then what you look at for the purposes of class analysis are the rights which the creditors have in that insolvency process

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1 of the company. Then, he goes on to explain in 43 what those rights simply consist of, as simply the right to submit a proof of debt in the insolvency process. Then, he explained in that case why it meant that the different types of creditors all have the same rights. As he said in the penultimate sentence of para.44, "They have the same rights in a winding up." And again, that is obviously a winding up of the Scheme company.

So, the first point, we agree with my learned friend that you leave out of the account for class purposes, not necessarily for fairness purposes, rights against third parties such as the FSCS. The other point where we agree with my learned friend is that, of course, looking at rights as against the company, the requirement for a single class is for the rights to be sufficiently similar, so the creditors in question consult together rather than necessarily be identical.

Now, if we leave out of account the rights against the FSCS, such as they may be, and look at what the rights against the company would be, and the relevant alternative, for these purposes, one assumes that we would be successful in getting a restitution order upheld by the upper tribunal under s.384 of the Act. Under that order, all of the investors would be treated in the same way. So, to be clear, what we would be proposing in our application for a

restitution order is that the order for restitution would be in favour of all unit holders, and there would be no 3 discrimination between them, and they would receive a 4 pari-passu share of the restitution, relative to their units they held in the WEIM. So, under our right of action, 5

everyone would have absolutely the same right.

7 Now those investors may, in addition to that, have different rights against the company under s.138D or in 8 9 tort, but as my learned friend said, those are all unsecured 10 claims, and we know from cases like Hawk and Noble that 11 certainly where insolvency is the comparator, that means 12 that they have the same rights. But also here, you are 13 looking at it in the context of the restitution order as well, where everyone will have exactly the same rights under 15 the restitution order, and any other rights of action would 16 inevitably have to give credit for what was received under 17 the restitution order.

18 So, you have really got the two points here. One is 19 everyone has just got an unsecured claim, but also, 20 actually, so far as the restitution order is concerned, 2.1 everyone has exactly the same rights under that order in any 22 event. So, my Lady, unless the FCA can assist your Ladyship 2.3 any further, I think those are the only points we wanted to 2.4 make

25 MRS JUSTICE BACON: Thank you very much, Mr Smith.

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1 Yes Miss Cooke 2

court as required.

SUBMISSIONS by Miss COOKE

3 MISS COOKE: Thank you. I am very grateful. I appear on behalf of Mr Joe Bannister, who has been engaged as the 5 independent Investor Advocate in this case. It has been 6 explained in the report and in my skeleton, but I think it 7 is worth emphasising at the outset that the Investor 8 Advocate is independent of the company and can reach of such 9 conclusions as he sees fit in the issues within the scope of 10 his role. And that role is, as your Ladyship will have seen 11 in summary, to consider representations made by creditors in 12 relation to the Scheme and also to engage any consumer 13 bodies, and then produce reports for this convening hearing 14 and for any sanction hearing in due course, and also of 15 course to attend this hearing through counsel to assist the

What I intend to do, and I am conscious the court has a lot to go through today, but what I intended to do briefly was just to outline the work that the Investor Advocate has done, and then look briefly at the key themes that have arisen from that work, obviously focusing on the issues that are relevant at the convening stage. I have been asked in particular by the Transparency Task Force to emphasise some particular points, so I will also do that.

MRS JUSTICE BACON: How long do you need, because we

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have got about five minutes before the lunch adjournment?
 MISS COOKE: Perhaps 15 minutes.
 MRS JUSTICE BACON: All right. So, if you want to
 start your submissions now or would everybody prefer us to

start your submissions now, or would everybody prefer us to go through to the end of Miss Cooke's submissions, and then take a slightly later lunch? I am seeing some nods. All right. Well, I think if you can conclude your submissions in 15 minutes and then that is a much more natural stopping point, and then Mr Bompas can start afterwards.

MISS COOKE: Yes. I am very happy to do that, subject potentially to coming back on the schedule, and I know we obviously have not had a chance to review yet.

MRS JUSTICE BACON: No, no. Everyone will be able to

MISS COOKE: Yes. Thank you. I am grateful. In terms then of the work that the Investor Advocate has done, his role and his contact details were notified to creditors in the practice statement letter and also in the FAQs on the Scheme website and his role will also again be explained in the explanatory statement. What has been done so far really is replying to or dealing with correspondence received from creditors, and as at 4 p.m. on 2 October, which was the cut—off date we applied, just for the purposes of the report — we continued to correspond, of course, after that — but at that point, 97 emails from 86 sources had been reviewed and

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responded to. That has been the bulk of the work that the Investor Advocate has undertaken. He has also, of course, engaged with the Transparency Task Force and reviewed the correspondence from Harcus Parker and Leigh Day, but I do not propose to say anything about that. My learned friend can address those issues raised by those investors.

MRS JUSTICE BACON: Can you just explain a little bit about what the Transparency Task Force does? Unless you want to leave that for Mr Pyatt.

MISS COOKE: Very briefly, it is an organisation, essentially with a mission to reform the financial sector. It has taken on scrutinising various situations, including this case, and it has taken an active role in considering this scheme proposal. Certain members of the task force or the task force leadership are investors in the scheme, including Mr Pyatt, so he will be able to provide some further information as to the role that the Transparency Task Force plays.

MRS JUSTICE BACON: I see. So, part of the Investor Advocate's role is specifically to engage with that task force

MISS COOKE: Yes. To engage with consumer bodies and media bodies, and that is an example of that, yes.

24 MRS JUSTICE BACON: Yes.

MISS COOKE: The report, which is in the bundle at

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 p.987, sets out in quite some detail the contents of the communications that have been received.

3 MRS JUSTICE BACON: I have read that.

MISS COOKE: I am grateful for that indication. I do
not propose to repeat everything. Some of it is obviously
not relevant, at least at this point, though there are some
points, though, that I think are worth emphasising, and they
come under the five headings.

9 The first is in relation to notice to Scheme Creditors. 10 My learned friend, Ms Toube, has already picked up on Mr 11 Bannister's view that reasonable efforts have been made to 12 draw the existence of the scheme to Scheme Creditors. There 13 are a few points that I think are worth drawing to the 14 court's attention. The first is that eight emails have been 15 received by the Investor Advocate with concerns that the 16 price statement letter had not been received or were asking to be kept up to date. The Investor Advocate has obviously 17 18 dealt with those, arranging for a hard copy, or directing to 19 the scheme website as appropriate.

A further point which the Transparency Task Force in particular emphasised, is a concern as to whether Scheme Creditors holding investments via platforms will have received the practice statement letter. The Investor Advocate raised this with Clifford Chance, the company solicitors, and understands that 98 platforms, brokers or

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1 intermediaries will be contacted, as well as, of course, the

2 advertisements that were being placed, but the Transparency

3 Task Force remains concerned that what will have happened is

4 that the notifications will have been sent to the

5 intermediary accounts, and what they may have received is a

 $\,\,$ $\,$ standard document notification, rather than specific wording

7 about what the communication is about.

8 In those circumstances, the task force is concerned 9 that perhaps the platforms have not passed on communications 10 as proactively as may have been ideal, and that information 11 has not been disbursed as widely as possible in terms of 12 notifying the Scheme Creditors as a result. There is a 13 concern that that may lead to an issue in relation to turnout. That is not an issue for today but is perhaps 14 15 something that will become relevant in due course. So, that 16 is what I was proposing to say about notification to 17 creditors. In terms of the timetable, one communication has 18 been received from an investor, suggesting that the time 19 before the convening hearing has been inadequate, but there

The second topic that I was going to mention is again around communication, but in relation to the return to creditors. This has I think now been addressed, but it is worth finding that 21 communications were received by the Investor Advocate about— or queries about the (inaudible)

is only one communication in that regard.

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of the payments they were going to receive. The Transparency Task Force was also concerned about that, and 3 it is in response to that. Your Ladyship made the point 4 earlier that the Investor Advocate raised this with the 5 company, and the company has produced that worked example that we went through earlier. A query been raised about why 6 7 that was not produced earlier.

The third point again really relates to the provision of information. This is the point that the Transparency Task Force wants to emphasise. In particular, they feel that a thorough explanation as to what a restitution order would look like, the likelihood of such an order being made and the likelihood of the company contesting it has not been provided. Those are matters that Ms Toube and Mr Smith both provided some further clarification on this morning, but I have been asked to emphasise that that is a concern to at least some Scheme Creditors.

18 The fourth point is class composition. As the court is 19 aware, the company proposes a single class. The communications received by the Investor Advocate in this 20 2.1 regard are summarised at para.2.3 of the report, and there 2.2 are, I think, three emails that the Investor Advocate has received indicating that there should be more than one class 2.3 2.4 of Scheme Creditors in this case. It has been suggested that those investors who fall below the compensation limit

of the FSCS should comprise one class, and those above that limit should comprise another class. As well as those emails, the TTF has raised a question as to whether retail and institutional investors, on the basis that they have a similar economic interest, should be in different classes. Those represented by my learned friend, Mr Bompas, of course raised this issue as to class, so I was not proposing to say anything further because that issue is going to be fully ventilated through the court.

The fifth issue then is in terms of the documentation. The Investor Advocate has reviewed the Draft Explanatory Statement and considers that sets out the purpose and impact of the proposed Scheme in a reasonably clear and concise way, and that he is generally satisfied that it includes the information that the Scheme Creditor will need in order to determine whether it is in their interest to vote in favour of the Scheme. He has also, I should say, reviewed the FAQs on the website as they have been updated, and is also satisfied that they provide reasonably clear and considered answers that should assist the Scheme Creditors. As we mentioned before, those have been updated in response to Mr Bannister's concerns.

There is a related issue around voting. There have been some concerns expressed as to the lack of clarity as to who is to be voting, in particular where investments have

been made by a platform, so I think that is something we would need to come back to when we have reviewed the 3 schedule to see if that has been clarified. So, those were the five themes really that come out of our report. 4

I think it is finally just worth flagging - perhaps not strictly relevant at the convening hearing stage - but I do 6 7 draw the court's attention to the fact that we have received a limited number of notifications as to how Scheme Creditors 8 9 intend to vote. One scheme creditor has raised a concern--10 sorry, two Scheme Creditors have suggested they are going to 11 vote against the scheme. One raised a concern about the 12 fund's assets being used to defend claims against it, and 13 the FAOs on the website have been updated to clarify that the fund's assets will not be used to fund the scheme. The 14 15 other has---

MRS JUSTICE BACON: The fund's assets won't, did you 16 17 say, be used?

18 MISS COOKE: Yes

MRS JUSTICE BACON: Because that would be funded from 19 20 the reserve fund? So, what do you mean, "The fund's assets 2.1 will not be used to fund the scheme"?

MISS COOKE: The WIF ... 22

MRS JUSTICE BACON: The WA----23

2.4 MISS COOKE: Yes. Sorry.

2.5 MRS JUSTICE BACON: Okay. Yes.

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MISS COOKE: Then the other email raises various 1 2. matters, including that the calculations provided have been 3 opaque, that the absence of engagement from the FSCS is troubling, and the interests of creditors do not appear to 5 have been central to the process. Those are obviously matters that individual investors may wish to take a view 6 7 on, and to take into account, but I simply draw those points 8 to the court's attention. 9

MRS JUSTICE BACON: I think you are right to say that any decisions taken at the meeting will be a matter for the sanction hearing, not the convening hearing.

MISS COOKE: Yes, exactly. Your Honour, on the other hand, three creditors indicated to the investor that they are likely to vote in favour of the Scheme. Issues as to fairness are obviously not relevant at this stage. It is fair to say that they have not been a theme in the communications that we have received, but such issues have been raised by Harcus Parker and Leigh Day, and so I will leave those matters to them. Unless I can assist the court further, that was all I was proposing to say. Mr Pyatt of the Transparency Task Force does have some points to add. but that may be after lunch.

MRS JUSTICE BACON: That will be after lunch, and can I 23 24 just suggest and indeed exhort Mr Pyatt and Mr Bompas to 2.5 liaise to ensure that there is not any duplication of

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submissions. What I do not want to do is hear twice the 1 proportionate amount of the Settlement same thing. All right, thank you very much. So, I will 2 Fund " 3 rise for the lunch adjournment, and we will then return, and 3 Now, that is highly important because as matters we will hear from Mr Bompas first, then Mr Pyatt, and then 4 4 proceeded this morning, the comparator, if you like, what is on the remote link, Mr Allan and Mr Dickenson very briefly 5 5 the position of Scheme Creditors before and what is the if they have got something to add, and I would just position of Scheme Creditors after, the comparator has been 6 7 emphasise if they have got something to add that has not 7 presented as insolvent liquidation. That is not, in fact, already been said. All right, thank you very much. how it is stated in the materials that have been presented 8 8 9 (1.07 p.m.) 9 to the court. The comparator is years. That is their word: 10 (Adjourned for a short time) 10 years of litigation before anybody can receive a penny piece, and that is what will happen if the Scheme is not 11 (2.12 p.m.) 11 12 MRS JUSTICE BACON: Yes, Mr Bompas. 12 sanctioned. It may be that in some time in the future there 13 SUBMISSIONS by Mr BOMPAS 13 is insolvent liquidation, but that is not what this company 14 MR BOMPAS: My Lady, yes. Just to mention, there is 14 is offering. Indeed, the----15 still a problem with the audio, apparently, on the remote 15 MRS JUSTICE BACON: Well, I think what is being said is link, leave aside the visual at the moment. So far as the 16 16 there would be an inevitable insolvency procedure because 17 shorthand writer is concerned—— the transcriber, I have 17 the amounts proposed in the FCA redress mechanism would be 18 mentioned it to Clifford Chance - I think it was Clifford 18 amounts that the company cannot pay and then there would be 19 Chance - and they say they are looking at it. So, what I 19 civil claims, which the company also could not pay. would like just to do quickly is to explain where I think we 20 MR BOMPAS: Yes, but what the company is proposing to--20 2.1 are at. There is much common ground between the parties as 2.1 remember the company is now a shell. It has no trading, no 2.2 to the applicable test on class and indeed on the applicable 22 business. It just has cash. It is not suggesting there is 2.3 principles for the conduct of this hearing. You have got 2.3 going to be any return to the shareholders. It is just 2.4 2.4 the skeleton arguments on that, good ample authority, and I existing to distribute that cash to people who have been will not waste time with what this hearing about. So far as disappointed by the company's mismanagement, and so what the 1 we are concerned, at the moment we are not opposing the $% \left(x\right) =\left(x\right) +\left(x\right) +\left($ company's doing, with the blessing of the FCA, is explaining 2. Scheme. We are concerned to get the voting right, and we 2

3 say there should be two class meetings. We are also

4 concerned to make sure they are conducted efficiently, with

Scheme Creditors being given a proper opportunity, and so

6 that feeds into the clarity of explanations in the

7 materials.

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Now, there is a point here that is worth stressing. My learned friend in her oral address to your Ladyship this morning explained that the settlement is with—— of the—— it has to be with the FCA — is of the underlying basis of the Scheme, that being the settlement of the FCA proceedings. That is how she said it, and that point is not just a throwaway. You can see it expressed by Clifford Chance in a correspondence on 3 October at p.1032 in the bundle.

Paragraph 6, say Clifford Chance to us:

"The scheme is being pro

"The scheme is being proposed in the context of a conditional settlement with the FCA and is not a settlement by reference to allegations of civil loss. We also note that under the FCA's methodology, all investors at the point of suspension of the WEIF, whether or not they are a private person, suffered the same loss and therefore should receive a

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how all that money is going to be frittered away in 3 litigation ----MRS JUSTICE BACON: Well, I do not think----5 MR BOMPAS: -- as a comparator. 6 MRS JUSTICE BACON: "Frittered away" is somewhat 7 pejorative. What it is saying is that if there was 8 litigation, that will necessarily drain the resources of the 9 company because the litigation is going to have to be paid 10 for somewhere. 11 MR BOMPAS: And there will be litigation. 12 MRS JUSTICE BACON: Yes. 13 MR BOMPAS: But the end of the litigation is not 14 necessarily insolvent liquidation. 15 MRS JUSTICE BACON: Well, what is your ----16 MR BOMPAS: It might be the company drifts on as a 17 shell, but meanwhile my clients, if the litigation is 18 successful, will have had, at the least, what will come from 19 the FCA process and probably more if they succeed in their 2.0 litigation and that will come from the FSCM-- FSCF rather. 21 MRS JUSTICE BACON: FSCS. 2.2 MR BOMPAS: Yes, but in the process too it is worth 23 remembering that what has been proposed by the FCA is that --2.4 sorry, there is no trace in the FCA's skeleton argument of the £50 million penalty that was mentioned in submission

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this morning. That £50 million penalty, if there is no scheme and if the FCA proceeds on its way, is highlighted in 3 several places in the documents as being material as a 3 consideration for investors to take into account when voting 4 4 on the Scheme, yet it was not mentioned by the FCA. You can 5 5 find it in the bundle at pp.142, 146, 1067 and 1119. 6 6 MRS JUSTICE BACON: There is no dispute. As I 7 7 8 decision, as I understand it, and then there would be any understand it, the FCA has made clear that in the event of 8 9 the Scheme being approved, it will sacrifice the £50 million 9 10 penalty. It will not make that sacrifice if the Scheme is 10 11 11 12 MR BOMPAS: Precisely, but that is not stated by my 12 13 learned friend in the skeleton, and one would have to ask 13 oneself how realistic would it be for the FCA to pursue a 14 14 15 penalty against a company if the price of doing that would 15 be to deprive investors of recompense out of that same 16 16

defaulting company? But that point is not addressed. Now. 17

18 the FCA in the Scheme—— sorry, the FCA has been deeply

involved in the preparation of the Scheme. We know that. 19

Mr Midl, in para.128-- 29 of his witness statement, explains 2.0

2.1 the extensive engagement that the FCA had with the company.

22 It is also apparent from the Investor Committee report. We,

in contrast, have really very little engagement with the 2.3 2.4 company. The relevance of the FCA settlement, of course, is

that what it is doing is it is causing -- sorry, the FCA is

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interested in making sure that investors in the Scheme who

2. had a loss get compensated under the compensation claim,

3 either -- without regard to the quality of their claims

against the company, provided only they were investors at

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time of the suspension, there is nothing to come to them, 6

7 and that was the point that was debated in the end of the

8 submissions this morning. There is nothing that comes to

9 those people under the Scheme, and part of the reason for

10 that is that that class of person is obviously not viewed by

11 the FCA, or indeed by the company, as having any worthwhile

12 claim at all . So, what you actually have is the FCA

13 position, which is everybody who has invested in the

company -- sorry, in WEIF at the suspension date, whether or 14

not a private individual, should have compensation in their 15

restitution amount, and whether or not you have a good claim

17 or indifferent claim to have compensation ----

MRS JUSTICE BACON: Yes.

19 MR BOMPAS: And of course ----

MRS JUSTICE BACON: Everyone is treated the same.

MR BOMPAS: Everyone is treated the same, but that is

2.2 not actually how it would work in a liquidation because in a

liquidation, the creditors will be required to prove their 23

24 claims, and the company could perfectly well by the

liquidator dispute the quality of indifferent claims

compared to claims that are good. So, if you are a private person with a 138D claim--

MRS JUSTICE BACON: By the time of any liquidation, the

FCA would have adopted its decision, and there would

therefore be a liquidated claim or an ascertained claim. I

should say. In terms of the FCA redress, part of the return

at that stage, that would have been specified in the FCA

other claims that had been successful in the court.

MR BOMPAS: In the absence of a scheme, the liquidator would be looking at the -- would be valuing claims in the

absence of a scheme, and it may be there is redress payments

directed, but it does not follow that a private investor

with a 138D claim is capped at the FCA restitution amount.

MRS JUSTICE BACON: No, because you would have -- I think, as the company has recognised, over and above that.

17 you may have additional claims that you may bring.

18 MR BOMPAS: Precisely.

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MRS JUSTICE BACON: Which may take your -- which may

20 result in individual investors having claims over and above

2.1 the FCA amount, which if not satisfied by the company in

liquidation, would then be brought to the FCFC (sic). 22

MR BOMPAS: If the company has gone into liquidation 2.3

2.4 because there has not been a circumstance in which other

25 folk interested in the company have supported it.

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1 MRS JUSTICE BACON: Yes, I am just not sure where this 2.

point is going. 3 MR BOMPAS: Well, where the point is going is because

it is going to come back to the question of class, and one

5 will see in the authorities, when I come to them, a question

6 of collateral agreement. As Clifford Chance have made

7 clear, what is happening here is the Scheme is being used as

8 a way of bringing into pass the FCA settlement with the

9 company, rather than having the company simply taking the

10 creditors and finding a way of distributing its assets

11 equitably amongst the creditors. Just again, my Lady, to

12 see the strength of the position, although the FCA do not --

it has not presented like this, if one compares the 13 14 explanatory statement at p.120 in the bundle—— at p.122.

15 MRS JUSTICE BACON: Just a minute. Sorry.

16 MR BOMPAS: So, one of the Warning Notice----

MRS JUSTICE BACON: No, I am sorry. I am not even -- I 17

18 am not even vaguely there. I have lost my cursor.

19 MR BOMPAS: Sorry, I beg your pardon. It is the

2.0 hearing bundle p.120.

21 MRS JUSTICE BACON: Yes, I know. I have lost my

2.2 cursor. I cannot make any -- I cannot find it. Wait a

23 minute. All right. Which page? 2.4

MR BOMPAS: It is p.120. Now, the point that one gets

to in this paragraph— sorry, para.2 and then para.4, is

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- that the FCA has, after investigation, issued a Warning Notice. That is not something that the FCA does lightly. 3 It has done it after-- it has taken that step after a 4 genuine investigation of the merits of the position, and you 5 can see what the conclusions are in in summary in subpara.(a) to (d) and para.4. Our claims are explained a 6 7 couple of pages further on at p.122. These are claims that 8 have actually been brought, but other investors will be in a 9 like position under 138D, and it is the same point, failing 10 to meet liquidity properly, having a strategy change, which 11 meant the fund became illiquid, taking steps to avoid the required tests for liquidity, overvaluing the assets and 12 13 misbehaving. So---14 MRS JUSTICE BACON: And how do those claims dovetail 15
 - MRS JUSTICE BACON: And how do those claims doveta with the FCA restitution or redress procedure? Is it that insofar as you establish a claim that goes beyond what you get in the FCA redress procedure, you would get then the difference?

MR BOMPAS: If the FCA's Warning Notice matures into a
Final Notice with the same penalties, it was told to you
this morning by Mr Bolton—by my learned friend, Mr Smith,
that that would likely be a foundation under the FCSF (sic)

I am going to keep on getting it wrong—the compensation
scheme for compensation. That is not how it has been
explained in the papers, in the explanatory statement or in

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1 the materials leading up to this hearing, and your Ladyship 2. had to probe with my learned friend, Ms Toube, to find out 3 actually what would be the outcome. The curiosity about this, it comes back to the position of both the FSA and the 5 Scheme, the compensation scheme, if one looks again into the hearing bundle at p.1123, it starts -- sorry, 1123. This is 6 7 part of the Chairman's report, which your Ladyship may have 8 seen. It is an annex, and what we have here is a response 9 coming from the company to the Chair of the Committee. At 10 para.4 on p.1124, the Committee start probing the question 11 of the best available outcome for investors represented by 12 the Committee, and the alternative is probed, para.(a), the 13 comparator in other words, and then on the next page, 1125, 14 under (b), "The Committee views the likelihood of the 15 investors being eligible for (and receiving) compensation 16 from the FSCS in any potential insolvency," and we want the 17 company - "The company [please] provide; (i) a summary of 18 its engagement with the FSCS, including any correspondence 19 or other materials which relates to the likely availability 2.0 of," and views and so on, and what one gets is the statement 21 that: "LSFL [the company] has engaged with the FSCS for

several months regarding the Scheme, and the treatment of

are confidential. Accordingly, LFSL is not able to share

copies of the correspondence.'

Scheme Creditors. These discussions, and all correspondence

So, behind the scenes there has been this dialogue about what is obviously a very important point for 2 3 investors — private investors, and we are not told anything 4 about it, other than we know that there will be no 5 compensation if the Scheme goes ahead for those creditors who are subject to the Scheme, and that who knows what would 6 7 happen if there is further pursuit of proceedings. Mr Smith has explained that if the FSC's (sic) Warning Notice turns 8 9 into a Final Notice, then yes, there will be compensation 10 most probably 11 MRS JUSTICE BACON: No. he did not say there would be. 12 He said that there might be, and Ms Toube said the same 13

 $\begin{array}{ccc} 14 & & \text{MR BOMPAS: Yes, but he highlighted the point that it} \\ 15 & \text{is not dependent, compensation is not dependent, on civil} \\ 16 & \text{claims being pursued by individuals.} \end{array}$

MRS JUSTICE BACON: No, he did not say it was not dependent. He said it might not be dependent, but that he is not speaking for the FCSC----

20 MR BOMPAS: Sorry.

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make a decision at the relevant time. I got a consistent
answer from both Ms Toube and Mr Smith, was that it was
possible that a claim under the FCSC compensation scheme
could be based on the FCA final determination, but they

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MRS JUSTICE BACON: And it would be for the FCSC to

1 could not say that for sure, not least because they do not 2. speak for the FCSC and a decision would have be made by the 3 FCSC at the time, so that is the answer. It is not it will definitely be triggered by an FCA determination, but I am 5 afraid none of that answers my question, which is how does 6 the civil claim—— how do the civil claims brought by your 7 clients dovetail with the FCA decision-making process? 8 MR BOMPAS: Okay, they dovetail to this extent that the 9 Final Notice—— sorry, if the Scheme goes ahead, it will be 10 published, Final Notice. The Final Notice, the basis for 11 the FCA's claim, as summarised in the explanatory document 12 statement, has the same underlying facts as the generic 13 claim form. That is to say the changes to the liquidity 14 profile in the fund and the way in which that was addressed 15 with the increasing illiquidity and, as a consequence. 16 dissipation of the better-valued assets. So, it is the 17 18 MRS JUSTICE BACON: Yes, so the same.

MR BOMPAS: — fundamental case.

MRS JUSTICE BACON: So, what is the difference between the two, and in what circumstances would there be both?

MR BOMPAS: In what circumstances would the civil proceedings follow on after a Warning Note, after a Final Notice? One would hope that it would not have to, but there may be further consideration of the quantum of claim for two

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MRS JUSTICE BACON: What relevance does the existence

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1	reasons. One, the FSC's claim is based on a slightly	1	of pre—suspension investors have on the question of class
2	shorter period than the civil claim — the civil claim goes	2	composition?
3	back to 2017; the FCA's goes back to $2018 - 1000$ and the other is	3	MR BOMPAS: What relevance? It is this, my Lady: that
4	that there may be further claims in valuation as to the	4	one can see that the company, and for that matter the FSC,
5	consequences of investors being locked into the fund. So,	5	are prepared to divide up the company's investors into
6	it was referred to this morning that my clients could be	6	categories. There is the pre-suspension investors, and
7	claiming as much as £300 million, and that is an indicator	7	there is the post-suspension investors, and we suggest that
8	that the civil claims may actually be rather more valuable	8	there is actually a third—— the second category again splits
9	than simply the aggregate amount of compensation or	9	into two. There are those who have the 138D claims, which
10	restitution that the FSC thinks appropriate, and that of	10	are $strong$ you know, they are good claims in insolvent
11	course then feeds on into what might be forthcoming from the	11	liquidation or without a liquidation, and then there are the
12	compensation scheme. It is in this explanatory statement.	12	others, the institutions , whose claims are very much weaker
13	It is para.125, which explains that if the Scheme goes	13	and can be discounted.
14	ahead, the FCA will conclude its proceedings successfully,	14	MRS JUSTICE BACON: Why?
15	so far as it is concerned.	15	MR BOMPAS: Well, because they do not have the
16	MRS JUSTICE BACON: So, you mean if the Scheme does not	16	fortunate position that breaches of COLL give them a cause
17	go ahead?	17	of action.
18	MR BOMPAS: No, if it does go ahead.	18	MRS JUSTICE BACON: Well, they have got other causes of
19	MRS JUSTICE BACON: Well, if the Scheme does go ahead,	19	action.
20	then the FCA will publish a decision, but it will not	20	MR BOMPAS: Pardon?
21	proceed to the stages of enforcement———	21	MRS JUSTICE BACON: They have or might have other
22	MR BOMPAS: Correct. Correct.	22	causes of action.
23	MRS JUSTICE BACON: —— and penalty.	23	MR BOMPAS: But so far only I think a handful have been
24	MR BOMPAS: Correct. The FCA's proceedings will have	24	brought.
25	concluded with a win for the FSC— the FCA rather, in terms	25	MRS JUSTICE BACON: But that does not make a difference
23	concluded with a will for the 130 the 16x rather, in terms	23	THIRD SOOT FEEL BY COTT. But that does not make a difference
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1	of having had a Final Notice, having established, if you	1	if they have got potential causes of action. They are all
2	like, its claim, its case, its contentions, but I come back	2	potential claimants who are all unsecured Creditors. Is
3	to the point that, as we see it, what the Scheme is doing is	3	there an authority which suggests that the strength of your
4	not intending to deal with all links, unsecured creditors.	4	cause of action———
5	It does not do that at all because it is only the Scheme	5	MR BOMPAS: I was going to come to the authorities
6	Creditors, the investor creditors as a class who are dealt	6	MRS JUSTICE BACON: All right.
7	with, and even then it is only a part of them, leaving aside	7	MR BOMPAS: —— on the point.
8	the pre—suspension date investors, and one can see that even	8	MRS JUSTICE BACON: I mean, can you just answer that
9	in Mr Midl's statement comparing paras.136 and 182 — and	9	question, is there an authority suggesting that the strength
10	they are pages, I think, 60 and 79 in the bundle — that the	10	of your cause of action should dictate fracturing of the
11	approach of the FSCS's scheme for the two situations is	11	class?
12	different . One gets that———	12	MR BOMPAS: I think the answer to that is yes———
13	MRS JUSTICE BACON: Which paragraph of his statement do	13	MRS JUSTICE BACON: Which one?
14	you want me to look at?	14	MR BOMPAS: —— and I think we will find it in Hawk, and
15	MR BOMPAS: Paragraph 21. It should be p.60.	15	
16	MRS JUSTICE BACON: Paragraph 21, which is on page———	16	it may be in another one which I am going to show you a little later, but can I come back to the order of events?
17	MR BOMPAS: I think I must have got a misreference, my	17	MRS JUSTICE BACON: Well, no, because you have just
18	Lady. It is paras.136 and 182.	18	made a submission———
19	MRS JUSTICE BACON: Yes.	19	MR BOMPAS: Okay.
20	MR BOMPAS: The FCS's position is dealt with as regards	20	MRS JUSTICE BACON: —— so I just wanted to understand
21	to the Scheme Creditors at p.60, and then as regards the	21	that, because you made a submission that there are some good
22	non—Scheme Creditors, it is dealt with at p.79. Where you	22	claims and some weaker claims. So I really wanted to
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23 24	see at para.182(c), it is expressed as a reasonable likelihood, para.182(c).	23	understand how that fits? MR BOMPAS: Okay, I think the point you can see in

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 $25\,$ Noble, if I have got this right. Yes, it is Noble. The

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MR BOMPAS: Sorry, can I just finish up on para.90?

question. It does not follow that, simply because a Scheme

MR BOMPAS: And then I must deal with your Ladyship's

MRS JUSTICE BACON: Yes.

1	case begins at p.238 in the bundle.	1	Creditor insolvency can restructure board litigation and all
2	MRS JUSTICE BACON: Yes, and which page?	2	Creditors should simply be placed in a single class. On the
3	MR BOMPAS: The relevant passage is—— well, it starts,	3	basis of an argument, the Scheme proposed the only
4	actually, at para.84, where the judge is going on to deal	4	alternative to financial Armageddon of a liquidation.
5	with class, Snowden J, and the point at para.84 is the	5	MRS JUSTICE BACON: Well, I have read the paragraph.
6	difference in his interests in motivations and rights. Then	6	MR BOMPAS: Paragraph 90?
7	UDL, I think, is dealt with. Then he goes on down through	7	MRS JUSTICE BACON: Yes.
8	to deal with Hawk at para.88, the usual point about	8	MR BOMPAS: Oh, you have read the whole paragraph?
9	discretion, and then in the context of a restructuring, it	9	Okay.
10	is established that:	10	MRS JUSTICE BACON: Yes.
11	"Where a Scheme is proposed and	11	MR BOMPAS: And you get the point of the last bit about
12	alternative winding up an insolvent	12	the solvent? Now, I have interrupted my Lady, I am sorry,
13	company, the relevant existing rights of	13	forgive me.
14	those which Creditors are having a winding	14	MRS JUSTICE BACON: No, no. So, I have read that
15	up see Hawk. In particular, as in Hawk,	15	paragraph, the question is still where is the authority
16	that means in relation to any proposals	16	which says that Creditors should be divided up or can
17	under a Scheme for determination and	17	legitimately be divided up according to whether they have
18	adjudication of Creditor claims against an	18	got stronger or weaker claims?
19	insolvent company, the correct comparison	19	MR BOMPAS: Well, I was relying on that passage, and in
20	is with the rights that Creditors would	20	particular on Hawk, they are different categories of
21	have under the statutory process for proof	21	insurance claim.
22	of debt in a liquidation ."	22	MRS JUSTICE BACON: Which passage in this in this
23	So, what is being acknowledged there is, in Hawk, you	23	authority? It says———
24	look at — and, in fact, in Hawk you can see it if you go to	24	MR BOMPAS: Paragraph—— Sorry, sorry. I thought I had
25	the report — how the particular types of Creditors —	25	got it out of para.89, my Lady, but———
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1	insurance Creditors with contingent claims, Creditors with	1	MRS JUSTICE BACON: Well, yes, but that does not say
2	the crystallised claims — how their claims are dealt with	2	that. It just says that the comparison with the rights that
3	outside the Scheme and then what is the provision the Scheme	3	the Creditors would have under the statutory process for
4	is going to make for the dealing with those claims. So you	4	proof of debts and liquidation . What that does not say is
5	can actually have Creditors who have a different position	5	that one therefore distinguishes between stronger and weaker
6	before the Scheme and, likewise, then you can look at their	6	claims.
7	position after the Scheme.	7	MR BOMPAS: No, but let us look at it like this, in our
8	MRS JUSTICE BACON: Is that because there might be	8	case, if the Scheme goes ahead, there will not be any
9	secured and unsecured debts?	9	process of proofing and solving liquidation . There will be
10	MR BOMPAS: Well, that is one obvious distinction. In	10	distribution pro rata to a whole group of people, indeed,
11	that particular case with Hawk it was not, it was insurance	11	whether or not they made claims at all.
12	Creditors of different categories of insurance.	12	MRS JUSTICE BACON: Yes, and if there is a liquidation
13	MRS JUSTICE BACON: So they would be dealt with	13	process, then everyone will make their claims in
14	differently in any insolvency?	14	liquidation, and they will all be unsecured Creditors?
15	MR BOMPAS: Absolutely. So, you can look at the before	15	MR BOMPAS: Oh, precisely. If there is no Scheme and
16	and after, as I think my learned friend Mr Smith submitted,	16	the company goes into insolvent liquidation, correct, but
17	but it does not mean that just because you are an unsecured	17	that process involves the liquidator reaching conclusions on
18	Creditor, you are in the same bucket with every other	18	the proofs of debts submitted. Just because I make a claim
19	unsecured Creditor.	19	does not mean that the liquidator is going to admit me to
20	MRS JUSTICE BACON: Well, where is the authority that	20	proof of the full amount of my claim. I may have suffered a
21	says that you are———	21	loss as a result of Link's failures, but that does not

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follow that I have a cause of action which is going to be

recompensed, allowed as a proof of debt in a liquidation $\!.$

MRS JUSTICE BACON: Well, how am I supposed to make a

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acknowledged and considered to be worthwhile and

decision on that now?

2	MR BOMPAS: Well, let me put it like this, my Lady. My
3	learned friend, I think, Mr Smith, conceded—— he may not
4	have conceded; he may have said it was a possibility, but
5	certainly recognised that the position of the compensation
6	as regards private investors was a consideration that could
7	tend to fairness, and then that would be for the purposes of
8	exercise of discretion at the next meeting, at the next
9	hearing. Accepting that, one does ask the question
10	rhetorically , why does the company so manifestly— $-$ has it
11	set its face against having two classes, when the division
12	is easy; it is not going to be the case that one could
13	say
14	MRS JUSTICE BACON: Well, look, that is not———
15	MR BOMPAS: $$ that they have a blocking minority in
16	the private investors.
17	MRS JUSTICE BACON: But the subjective motivation is
18	not a question for me. The question for me is whether it is
19	appropriate to have a single class because of the interests
20	and rights of the Creditors and, in particular, looking at
21	the rights of the Creditors against the company as opposed
22	to the interest that they might have arising from rights
23	against third parties.
24	MR BOMPAS: I accept that, my Lady, but with this
25	difference that I do want to show you authority for the

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1 point that when one is looking at the question of the 2. sanction to be given to a Scheme, outside arrangements do 3 matter and can be attended to in the question of class consideration, and here we have outside arrangements between 5 the FCA and the company, which are going to be carried into effect dependent on the Scheme. That is the settlement 6 7 agreement, and the Scheme, as I started with this address, 8 is concerned with the settlement. That is to say, the FCA's 9 proceedings. That is the driver. Can I---10 MRS JUSTICE BACON: The outside arrangement that you 11 are saying is relevant is the FCA settlement agreement? 12 MR BOMPAS: Correct. MRS JUSTICE BACON: I do not understand that. I 13 14 thought you said that the external arrangement that caused 15 the difference was the existence of rights as against the 16 FCSC. 17 MR BOMPAS: Oh yes, absolutely. That is as a key 18 factor when one is looking at the distinction between the 19 private investors on the one hand, the private persons on 2.0 the one hand, the 138D claimants on the one hand, and 21 institutions and such like on the other. That is an 2.2 integral part of their claims. They are investors who have 23

this statutory position given to them as part of their investment rights, and those are to be given up, and as part of also that, the compensation scheme is released from any

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prospect of further claims to make recovery on behalf of what it is had to pay out to such investors. That is the effect of the Scheme. Can I just show my Lady Sunbird, which was our authority's bundle, Tab 6, p.95. Yes. The paragraph I wanted to draw your Ladyship's attention to, you will have seen that the class composition tests, starting on 6 p.99, para.18, all very familiar language, including para.21, it is about the solvent, the balancing factor of 8 9 too many small classes, but lastly, para.23: 10 "Finally and relevantly, for the 11 instance case, modern authorities 12 emphasise that in assessing how Creditors' 13 class should be constituted"---14 MRS JUSTICE BACON: I have read the paragraph. 15 MR BOMPAS: Paragraph 23 at the foot of p.99. 16 MRS JUSTICE BACON: Yes Yes 17 MR BOMPAS: Oh, I am sorry, my Lady, 18 MRS JUSTICE BACON: No, it is all right. I have 19 highlighted this already. 20 MR BOMPAS: Okay, and then one can see----21 MRS JUSTICE BACON: But you have drawn my attention to 2.2 that paragraph and so that says that: 23 "The Scheme should be looked at in 2.4 the context of the restructuring as a 2.5 whole, including any rights conferred in

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1 other agreements that are provided for 2 under the terms of the Scheme." 3 Are you saying that there are other agreements or under 4 the Scheme there? 5 MR BOMPAS: Well, your Ladyship has my submission about 6 the landscape with the settlement agreement made with the 7 FCA 8 MRS JUSTICE BACON: All right, but the FCA settlement 9 agreement does not distinguish between your clients and 10 other Creditors?

11 MR BOMPAS: No, precisely, it does not, but what it 12 does do is it deals with the position of the FSC, the 13 compensation scheme, and also with my clients in the 14 company

MRS JUSTICE BACON: Well, it does not deal with the FSFC compensation scheme. That is completely separate. The FCA will make a determination if the Scheme does not go ahead, and it will then proceed to enforcement action. It will not proceed to enforcement action if this Scheme is approved, but that does not ----

MR BOMPAS: But it is a necessary corollary of the 2.2 release of the investors' claims. They have no further

2.4 MRS JUSTICE BACON: Yes, but that is nothing to do with 2.5 the FCA settlement. The FCA settlement puts money into the

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Scheme, if you like, by sacrificing the £50 million penalty, 1 which Ms Toube does not deny, but she says that is a but the FCA itself does not say anything about FCSC knock-on effect arising from a third-party claim not to 3 compensation that may or may not what be due, and that is 3 right as against the company. 4 what the FCA has made clear. It is a different entity. 4 MR BOMPAS: But mv Ladv ----MR BOMPAS: Well, they are, except that the latter, the MRS JUSTICE BACON: That was the relevance of the 5 5 FSCS, lies under the responsibility of the FSC. passage from UDL, which I asked her to address. 6 6 MRS JUSTICE BACON: All right, but the FCA has said in 7 7 MR BOMPAS: Yes. turn that it is not making any submissions about the 8 8 MRS JUSTICE BACON: And, actually, that was not a 9 position of the FCSC, and it does not do that in the 9 request only to Ms Toube, it was a request to you as well. 10 1.0 settlement arrangement either. MR BOMPAS: Right, and I was going to just actually MR BOMPAS: Well, my Lady, I do say that what we have 11 11 pick up on exactly----12 MRS JUSTICE BACON: Yes. 12 investors who have a particular rights. They include rights 13 that are valuable because they are rights against the 13 MR BOMPAS: —— that point, if I might, very briefly. company which if they are vindicated will produce or should 14 14 that the difference between the two is that, in the UDL 15 produce compensation from the FSCS. 15 case, whether you were an employee or not, you were a 16 MRS JUSTICE BACON: May produce. 16 Creditor. An employee, putting the hat on the employee, had 17 MR BOMPAS: I said should, my Lady, but may produce. 17 a different right that was distinct from the claim as a 18 right, and then the FSCS will continue to have a claim 18 Creditor. In our case, the entitlement to compensation, the 19 against the company. So the position of the FSCS and the 19 right to compensation, it springs from the very nature of rights or the ability of investors to have recourse to that 20 the claims that one has to be able to start off bringing 20 2.1 relief, claimant relief, under s.138D of the FSMA. You are

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a claim from the FCSC.

21 is an integral part of their rights as investors which have 2.2 been, we say—— which give them the claims against the 2.3 company and therefore rights against the company.

MRS JUSTICE BACON: That is the point that you have made at para.29 of your skeleton argument, but that is not

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an agreement that is provided for under the terms of the Scheme. The Scheme itself does not require any giving up or any sacrifice of FCSC recourse. It follows, as you say, simply as a corollary from the release of claims against the

MR BOMPAS: Yes, but my point on Sunbird, and I think it is repeated—— and I am going to show my Lady, if I may, another case, it is repeated elsewhere, is that when one is looking at the question of class, it is not right simply to look in an entirely narrow way on the individual investors and the institutional investors without also having regard to the fact that the position of the two as vis-a-vis their rights against the company, what happens if they are vindicated, is different. That is the simple point that ${\sf I}$ am submitting, and I think, my Lady, there was one that your Ladyship invited my own friend, Ms Toube, to deal with this morning. It looks as though the Scheme is intended to address a further position over and above, simply, the claims that any investor might have against the company for wrongdoing

2.1 MRS JUSTICE BACON: Sorry, and what is that further 2.2

23 MR BOMPAS: The private investors' position as regards the FSCS 2.4

MRS JUSTICE BACON: Well, that is a knock-on effect

1 person is compensated. So it is not, if you like, simply 2. because you are an employee, it is actually because you have 3 a claim of a particular character, a claim arising under s.138D. That is how I would seek to distinguish Lord 5 Millett's exposition, as it is, however, on the facts of 6 that particular case. 7 MRS JUSTICE BACON: You are focusing on the words not 8 deriving from any legal right against the company? 9 MR BOMPAS: Sorry, my Lady, which paragraph are you 10 referring to? 11 MRS JUSTICE BACON: On p.186. 12 MR BOMPAS: 186? MRS JUSTICE BACON: Of Lord Millett's judgment in UDL. 13 14 MR BOMPAS: Oh, sorry, sorry, 186 in the-- No. 15 MRS JUSTICE BACON: Am I right in thinking that your 16 point is that in this case, the right to claim compensation 17 from the FCSC derives from the legal right against the 18 company, because it derives from, you say, the particular 19 nature of the claim that your clients may be bringing? 2.0 MR BOMPAS: Correct. 21 MRS JUSTICE BACON: But then one runs into the problem 2.2 that, actually, the claims that are made following an FCA 23 final decision and enforcement process may also give rise to

a private person and as a consequence, you have particular

rights of action and particular prospects of the company

being subjected through the process of the FSCS machinery to

claims that go on well-funded by the FSCS, while the private

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MR BOMPAS: What has actually not been explained, I do

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answer to this, is what actually is the right of action that 3 an individual would have if the determination were made by the FSC that there should be restitution paid to the 4 5 individuals. I would expect in principle, that the cause of action would lie with the FSC to enforce that, which 6 7 rather suggests that the outcome of the FSC's process is not 8 a further and better cause of action lying on the part of 9 the individual, and that is a distinction between that 10 particular type of claim and the claim that the individuals 11 have under s.138D? 12 MRS JUSTICE BACON: No, I am afraid I did not follow 13 14 MR BOMPAS: Well, we are looking at what the 15 individuals give up and what the individuals have-- or, 16 sorry, what the investors have and the investors give up. The proposition at the moment is that the investors have 17 18 claims against Link, and we say, yes, they do under 138D. MRS JUSTICE BACON: Investors have claims against? 19 20 MR BOMPAS: Against the company. 2.1 MRS JUSTICE BACON: Yes. 2.2 MR BOMPAS: Thank you. We say they do; if they are a 2.3 private person, you have a 138D-type claim. The company

not think, in the materials, and I cannot tell my Lady the

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says and FSC recognise that other people, besides those. have suffered loss, and that is where the FSC comes from

1 with its restitution payments, but what it does not follow 2. is that those other people have themselves causes of action, 3 or indeed, that they have causes of action to have the compensation, the restitution amount paid to them if ordered 5 by the FSC. Their causes of action would remain the same, both before and after the award from the FSC. So, in other 6 7 words, the FSC's position in ordering compensation is, if you like, a potential burden for the company, but it is not 8 9 necessarily giving the investors a cause of action, so they 10 have no rights.

MRS JUSTICE BACON: Yes, so the FCA determination does not affect any cause of action which individual investors might have.

MR BOMPAS: Correct.

MRS JUSTICE BACON: And you say your clients will have s.138D claims; institutional investors may have tortious claims? Those will remain unaffected by the terms of the regulatory action----

19 MR BOMPAS: Correct.

2.0 MRS JUSTICE BACON: -- taken by the FCA. I understand 2.1 that, but going back to the UDL, what are you saying is the 2.2 relevant distinction?

23 MR BOMPAS: Well, I am submitting that the distinction 24 here, and it is one I know your Ladyship is considering, is

between a cause of action of one arising in one way and a

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cause of action arising in another way. Typically, a

Creditor proving a liquidation has a debt. It may be an

3 employee has unpaid wages, and typically in a liquidation,

4 unless there is somebody who is given the right to prove

5 preferentially, unsecured Creditors are all in the same

class, but you have to prove your claim, and it may be that 6

7 some claims are better than others and are admitted to proof

and some are not. The character in our case of the claims 8

9 under 138D has a particular kind, and going with it, it has

10 also, I would say, the right, the prospect at any rate, of

compensation under the FSCS Scheme. So it is not---

12 MRS JUSTICE BACON: So, your point that a s.138D claim 13 carries with it the prospect of compensation under the

14 FSCS—— I should start saying this the right way around, FSCS

15 Scheme, and other claims do not, but that is not what I have

heard from Ms Toube and Mr Smith, which in their submission 16

17 one cannot say at this point what types of claim the FSCS

18 will admit, and the FSCS has specifically neither confirmed

19 nor denied. It simply says it will have to address it at

the time. So in terms of the decision that I am making now, 20

2.1 I cannot proceed on the basis that only s.138D claims will

2.2 be good ones in terms of sounding in FSCS compensation?

MR BOMPAS: Well, what your Ladyship has not been 2.4 helped with is the -- I mean, it is in the papers plentifully

set out, but is that the requirement, effectively, to make a

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1 claim for compensation is that you are a person, a private

person, a retail investor, call it what you like, the people 2.

3 who will fall, and we would suggest, into the 138D category,

but if you are a platform, if you are Hargreaves Lansdown,

you are not going to be able to bring a claim for

6 compensation; you are simply not an eligible claimant.

MRS JUSTICE BACON: All right, but then the right to 7 8 bring a claim under the FSCS Scheme does not necessarily 9 turn on the question of whether you have got a particular 10 type of claim or not. It turns on your eligibility as a particular kind of investor --

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MR BOMPAS: Correct.

MRS_JUSTICE BACON: -- in that submission, but that 13 14 then does not derive from the type of claim that you have

got, whether it is 138D, or whether it is a tort claim, or 15

16 whether it is indeed, as Ms Toube and Mr Smith submitted, a

claim arising from the FCA determination. All of those 17

18 types of claim may ultimately lead to an FSCS compensation

19 claim, which turns on your character as an investor rather

2.0 than the type of claim you are making.

21 MR BOMPAS: Well, ves. but the simple proposition for 2.2 present purposes is that it can be assumed that if you are a

23 138D investor and you have your 138D claim, then you are 24 going to be eligible to have the compensation if you succeed

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2.5 on your 138D claim?

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MRS JUSTICE BACON: Yes, but the claim itself does not 1 2 derive -- your eligibility under the FSCS compensation scheme 3 does not depend on you having a s.138D claim or otherwise. 4 It depends on the type of investor you are. So that is my 5 problem with the way in which it is framed in UDL, because there, the trigger for the additional payment was whether 6 7 you were an employee or not. In this case, the trigger for 8 an additional payment, at least on the materials before me, 9 is not the type of claim that you bring as in the specific 10 basis for the cause of action tort, or the FCA 11 determination, or s.138D, but it is whether you fit within 12 the eligibility categories under the FSCS compensation 13 14 MR BOMPAS: Well, when one has upwards of a quarter of

MR BOMPAS: Well, when one has upwards of a quarte
a million claims, one can see that there are going to be
people who would say they have different characters but,
essentially, coming back to the facts of this case, there
are in truth only two categories of claimant or investors.

There are the retail private persons who actually, we would
suggest, have their position as Creditors established or

suggest, have their position as Creditors established or
 capable of being established under 138D, and in that way

they have the right to compensation, so that it has to be

23 looking at the matter in a very purist way to say, "Well,

24 no. They are no different from any other unsecured Creditor

investor into the WEIF Scheme." The reality is that you are

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either going to be a 138D claimant, and with that you have
the right to the compensation, or you are going to be
somebody else. My Lady, if I can just draw your attention
quickly to make some submissions on — I know time is
pressing — the other authorities. You had———

MRS JUSTICE BACON: Can I just understand your
position? Supposing one of your clients also had a tort

MRS JUSTICE BACON: Can I just understand your position? Supposing one of your clients also had a tort claim, is it your submission that that tort claim falls outside an FSCS compensation claim? Also, if your client———

MR BOMPAS: It would not if it were vindicated, but it is not being brought.

MRS JUSTICE BACON: No. All right. Well, let me reframe that question another way then. Let us suppose one of your clients, following the failure of the Scheme to be approved, has a claim as found by the FCA in its redress mechanism. Are you saying that that would not entitle it to seek FSCS compensation if the company does not pay out?

MR BOMPAS: If one hypothesises that there has not been a judgment on the 138D claims and the compensation is directed by the FCA———

MRS JUSTICE BACON: FCA, yes. That is what———
MR BOMPAS: ——then your Ladyship is right that there is

 $24\,$ $\,$ the prospect, depending on how strongly Mr Smith puts the

threshold, there is a prospect of compensation from the

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2 MRS JUSTICE BACON: So, there would be. So, in that 3 case there would be no s.138D claim, but there would be 4 prospect of compensation? MR BOMPAS: Well, sorry. No, no, no. 5 MRS JUSTICE BACON: All right. 6 7 MR BOMPAS: I simply hypothesised there had not yet 8 been a 138D claim. 9 MRS JUSTICE BACON: All right, yes. That is my 10 hypothesis. There had not been a 138D claim, maybe because 11 your client decides it cannot do better than the FCA 12 compensation. So, the compensation or redress is ordered. 13 Company does not pay out, so it can then go to the FSCS. 14 MR BOMPAS: Sorry. I have muddled. I have muddled———-15 MRS JUSTICE BACON: Yes. No. We are all muddling the terms-- FSCS and get its claim. So, you accept that there 16 17 is a prospect that it could do that? 18 MR BOMPAS: Yes. I mean, the question then would not be, "Have you established your 138D claim?" I accept that, 19 20 my Lady, that what one would be looking at would be, in this 2.1 hypothesis, a world in which the investors are given the 2.2 choice and they may say, "Well, you know, I will just take 2.3 the money and I will surrender any claim I might have under

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1 MRS JUSTICE BACON: Right. So, in that situation, how 2 does the compensation claim from me under the FSCS derive 3 from the right against the company being different from the 4 right of the———

138D, and I will take what has been offered under the-

effectively as a compromise of the restitution amount."

MR BOMPAS: I think, my Lady, your Ladyship is 5 6 absolutely right. You make the point that the rules for 7 compensation under the Scheme and the 138D threshold to the 8 private person are not the same. That is to say that you 9 can be, if one works to all the permutations under the 10 rules, somebody who could qualify for compensation without 11 having to have been a private person with a 138D claim as a 12 consequence.

MRS JUSTICE BACON: Well, no. Okay. All right.

MR BOMPAS: But we submit that the reality is in the
present case, there will not— anybody who is going to get
compensation is going to be also a private person who would
be suing under 138, could sue under 138D.

MRS JUSTICE BACON: All right.

MR BOMPAS: Gategroup; I was going to run—— make some 20 $\,$ very brief points on their submissions of the case. You

21 probably already have got the points.

22 MRS JUSTICE BACON: Are we talking about Gategroup 23 at———

MR BOMPAS: Gategroup at 458. One has here the -- it is Zacaroli J setting out the test for composition. My Lady

1	has looked, I think, probably at already p.582, with the	1	going to be treated by the liquidator with attention to
2	various propositions one is familiar with. The interesting	2	their claims in the process of proof. So, you then say, the
3	point here is para.3.	3	conclusion is that in that situation they will all normally
4	"Rights of the Creditors against	4	have the same essential decision to make at Scheme or plan
5	third parties, for example, guarantors,	5	meetings, and then you get the differences, the complication
6	will generally constitute interest, as	6	improving.
7	opposed to rights, different in interest,	7	With the—— as at the top of the next page—— formal
8	maybe relevant."	8	insolvency, replacing what is being replaced by what goes
9	So, in other words, the learned judge has reserved	9	under the Scheme. Then, the judge goes on:
LO	himself the possibility that the general has exceptions.	10	" this is a fact—sensitive aspect
L1	One then has the application of the test in this case at	11	of class constitution, because there will
L2	para.186 at the bottom of the page, and the comment is that	12	be contexts in which the nature of the
L3	the case is unusual, having looked at the comparator. The	13	dispute and the way it is to be litigated
L4	discussion on p.460 is quite prolonged. One can see though	14	makes it impossible for consultation with
L5	at para.193, the learned judge starts looking at the	15	a view to a common interest to occur with
L6	substance rather than the form. Then, the (inaudible) has a	16	other unsecured Creditors. I am persuaded
L7	submission overleaf, p.406, about what unites and what	17	that, in the particular and relatively
L8	divides.	18	unusual context of this case, the impact
L9	The learned judge has difficulty with that, and the	19	of the approval of the restructuring plans
20	conclusion is that in this particular case there should be	20	on the conduct of litigation by the
21	different classes at p.208. Sorry. Para.208, on p.585.	21	disputed derivative contract Creditors is
22	Now, what that — I suggest — shows is that it does not	22	just such a case. The factors which drive
23	simply come out in the wash, that if you are a Creditor	23	me to that conclusion are set in the
24	before and after, you are going to be somebody who should	24	context of the ability of other Creditors
25	all be in the class with every other person who is a	25	to challenge the admission to proof of the
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1	Creditor. It is a case on the facts, of course.	1	derivative claims and, perhaps more
2	MRS JUSTICE BACON: Well, actually he is saying that	2	importantly the fact that if the
3	the Creditor has had rights against completely different	3	restructuring plan is approved, the
4	entities .	4	planned companies themselves will continue
5	MR BOMPAS: Yes, but that is after analysis of—— and a	5	to carry on their business in the ordinary
6	quite careful scrutiny. We say, in our case the Creditors	6	way under the control of their existing
7	have rights against the company, yes, but they also have as	7	management."
8	part of their rights against the company the incident that	8	So that's quite an interesting case on the facts, when
9	they could force the company to end up confronting the FSCS	9	we see a judge reaching the conclusion that actually there
LO	on having had their compensation paid to them under the	10	is a distinction between the categories of unsecured
L1	Scheme—— sorry, under the compensation arrangements, under	11	Creditors. I have referred — I have already showed my
L2	COMP, in the handbook. Cimolai, which is one I think was	12	Ladyship Noble.
L3	referred to in my learned friend's skeleton at para.71(3).	13	MRS JUSTICE BACON: Can I just look at para.53?
L4	Here, at p.488 is where the extract I think was. You will	14	MR BOMPAS: Paragraph 53.
L 5	see the submission at para.51, which your Ladyship already	15	MRS JUSTICE BACON:
L6	looked at:	16	"the unsecured Creditors will be
L7	"He accepts that is not unusual in a	17	focusing on the simple question of whether
L8	straightforward English Scheme or	18	the proposed restructuring plans provide
L9	restructuring plan for Creditors with	19	them with a better return than the
20	disputed and undisputed unsecured claims	20	relevant alternative, the litigating
21	all governed by English law to be put in	21	Creditors will also, and possibly
22	the same class where a formal English	22	exclusively be focusing on the impact of
23	insolvency is the appropriate comparator."	23	the restructuring plan on such matters as
			<u> </u>
24	And the reason for that, my Lady, is because in the	24	litigation tactics."

liquidation , they are going to be put in the $\!-\!-$ they are

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How does that translate to this case?

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1	MR BOMPAS: Well, we say that the crucial point,	1	213, the learned judge says:
2	actually, and almost the elephant in the room, is the	2	"I say 'largely been dispelled' [that
3	compensation, that if you're an institution, you have no	3	is to say, confusion] because there remain
4	prospect of compensation. If you are a retail investor up	4	to my mind, some blurred boundaries,
5	to £85,000, you have the prospect of your claim being made	5	especially as to what meaning is to be
6		6	
7	whole. So, to imagine that the two types of Creditors can	7	given in the context to the term 'rights
	work out what is better for them is really very difficult to		against the company'."
8	imagine. For the institutional investor, they get an amount	8	And that is, I am afraid, the boundary that my Lady is
9	of money which they quite possibly would not otherwise get,	9	on in this case.
10	and it is all over. For the retail investor, they have the	10	MRS JUSTICE BACON: Yes.
11	possibility of saying, "Well, actually, you know what? I	11	MR BOMPAS: The other point that I think, again, my
12	want to see this company properly put into liquidation and	12	Lady may have picked up is at para.68, which begins on
13	investigated."	13	p.817, where, at the foot of the page, there is the
14	MRS JUSTICE BACON: But there is no—— I understood that	14	difficulty with the comparator and the solvent of
15	there is no doubt that if the Scheme is not approved, the	15	insolvency, if you like, as a solution to any difficulty .
16	investigation is going to go ahead, so———	16	The learned judge says that actually, there is more to it
17	MR BOMPAS: No, no, no. Sorry. My Lady, if the Scheme	17	than that. My Lady, I fear that if I continue, I will be
18	is approved, the FCA's warning notice will become a final	18	repeating myself. We say that in this case, there is
19	notice, but that is the end of any, if you like $$	19	actually— there are two classes, and there should be two
20	MRS JUSTICE BACON: Sorry. I must have misspoken: "If	20	class meetings. I was very surprised, given the way in
21	the Scheme is not approved, the investigation will go	21	which the company explained its urgency, to learn that if
22	ahead." The FCA investigation and enforcement procedure will	22	two class meetings are directed, the company has it in mind
23	go ahead.	23	to appeal. That was odd. One would think that if there are
24	MR BOMPAS: Correct.	24	two class meetings, they would just want to get on with it.
25	MRS JUSTICE BACON: So, we are not focusing— so the	25	MRS JUSTICE BACON: Yes. Well, it is 25 past 3, so we
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1	initial focus will be on that, and you have said that it may	1	have been going for a bit more than an hour. I think that I
2	be that that some of your clients will then pursue civil	2	will take five minutes and then if there are any sweep—up
3	claims, but in the first and foremost instance, what will	3	points that you want to make———
4	happen if the Scheme fails is that the FCA process will take	4	MR BOMPAS: I will try and make sure that they are very
5	its course.	5	few.
6	MR BOMPAS: Yes. There will be meanwhile, quite	6	MRS JUSTICE BACON: Yes. All right. Thank you very
7	possibly, the litigation pursuant going on, and then quite	7	much.
8	possibly the company will be forced into insolvent	8	(3.23 p.m.)
9	liquidation as part of that, and then quite possibly its	9	(Short break)
10	history will be looked at to see what other claims there are	10	(3.34 p.m.)
11	in its insolvent liquidation .	11	MR BOMPAS: My Lady, I will be very brief.
12	MRS JUSTICE BACON: But this is not———	12	MRS JUSTICE BACON: The video is now up and running,
13	MR BOMPAS: The Scheme avoids that and all I was trying	13	I will be able to have submissions from the two investors on
14	to highlight was the distinction between an institutional	14	the video link.
15	investor and the individuals, the private investors. They	15	MR BOMPAS: Right, and I will let that happen as soon
16	are both, we suggest, in different boats, so that if you are	16	as would be practical, which should be momentarily. On the
17	looking at the question, "Is there more that unites them	17	voting form that was handed up this morning, and we saw for
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Orleans, Texas and Pacific Junction Railway Co [1891] 1 Ch 138

 $18\,$ $\,$ than divides them" the answer is no. More divides them than

unites them. The other authority I thought I might deal

in my learned friend's bundle, starts at p.798, and then

there is a p.815. In Hilliard J's discussion you see at

with was Apcoa. Yes. I think your Ladyship may have picked

para.55, where after having referred to UDL and Alabama, New

this up this morning. In Apcoa, which is the last authority

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has been discussion as to the $\,$ possibility $\,$ of having a hybrid $\,$ $\,$ $\,$ 140 $\,$

Likewise, with the question of virtual meetings, there

improvement on what was in the materials before the court as of nine o'clock this morning, that likely it is something

that we for our part will be able to agree, but what we

think is that there should actually be a bit of discussion

 $18\,$ $\,$ the first time, I am told that it is a very considerable

amongst those represented today to settle that.

meeting of some sort. I think it has been contemplated that the meeting room could likely be provided by one of the 3 firms of solicitors , that it is unlikely to need to be very 4 large. I mean, it is not-- we are not talking about Wembley Stadium. 5 6 MRS JUSTICE BACON: No. That is what I had in mind: a 7 reasonable size meeting room, but yes. It is not going to 8 need to accommodate thousands 9 MR BOMPAS: No. The parties are having a discussion 10 about that, so that should be capable of being resolved. 11 Then, there is a question of timing. In our skeleton, I 12 think we referred you to a case of Indah Kiat - it is at para.43 — on a question of timing. That is actually quite an interesting case, if my Lady has the opportunity to look 14 15 at it. It starts in our bundle at p.43, then goes on to 16 17 MRS JUSTICE BACON: Can you please tell me what 18 paragraph of your skeleton argument? MR BOMPAS: In our skeleton, it is referred to at 19 20 para.43 on p.12, Indah Kiat, and the question is, really, 2.1 the timing of the meetings and the next hearing. In that 2.2 particular case, the learned judge actually adjourned the 2.3 convening hearing, considering that there were matters that 2.4 needed to be got straight in terms of actually addressing

creditor position. I am not inviting my Lady to adjourn any 141

1 further this hearing. What one would hope is that, with 2. several days, let us say five working days, the parties 3 should have been able to sort out the question of communication voting, and that could go into the form of 5 order that we had made on your Ladyship's judgment. 6 MRS JUSTICE BACON: Can that not be sorted out between 7 now and Thursday? MR BOMPAS: Well, we could try. That is about the best 8 9 I can say, but we do not see myself—— we do not see for our 10 part that the time for having the meetings - meetings or meeting, depending on your Ladyship's ruling $-\ \mbox{and}\ the\ time$ 12 for the hearing is actually realistic . We would suggest 13 that the truth is the timetable needs to be revisited, with 14 longer for the meetings and then, naturally, a follow-up probably early New Year for the sanction hearing. Then, the 15 final point to mention is the Explanatory Statement. We 17 only saw the detailed documents, the rules and the 18 Explanatory Statement late on Friday evening, and I have to 19 say that I cannot, as I stand here, say that we will have no 2.0 comment or criticism of it when it comes to be circulated. 21 At the moment, all I can say is I cannot envisage anything. but I cannot promise that we are bound by that when it comes 23 2.4 MRS JUSTICE BACON: Did you see a draft Explanatory

Statement before then, or is that the first ----

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2 MRS JUSTICE BACON: That is the first you have seen? 3 MR BOMPAS: That was the first we saw of it. I mean, 4 others have seen it but not us MR PYATT(?): George, it was on Thursday. 5 MR BOMPAS: Thursday. I am sorry, I am corrected, 6 7 Thursday evening. So, we did our skeleton argument having had it but, naturally, it has been very rushed. 8 9 MRS JUSTICE BACON: So, you saw this for the first time 10 on Thursday evening? 11 MR BOMPAS: Thursday evening, my Lady, and what is 12 disheartening is that I showed my Lady the paragraph in Mr 13 Midl's witness statement. I think it is para, 129, which showed how much interaction there had been with the FCA, 14 15 say, about the documents for the court. MRS JUSTICE BACON: Did none of your clients have 16 17 discussions with the Investor Advocate about the draft 18 Explanatory Statement? MR BOMPAS: One of our clients is -- The answer to that 19 20 is no, but what we do know is that this was being discussed 2.1 with the Investor Committee, but one of our clients, who is 22 also on that committee, cannot reveal to us confidential 2.3 information on the Committee. So we would not get -- from 2.4 the ninth member of the Committee, we would not have had a back door into the Explanatory Statement, so until Thursday

MR BOMPAS: No, no, no, no. We did not --

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1 all we had was the practice statement letter. MRS JUSTICE BACON: But is this -- Again, is this not 2 3 something that can be sorted out on Thursday at the consequentials hearing? Because you will have a full day 5 tomorrow for all of you to look at the voting form and the 6 Explanatory Statement. 7 MR BOMPAS: Well, we will certainly do our best, my 8 Lady, of course, but it means identifying points and then 9 inviting Clifford Chance to amend the Explanatory Statement. 10 and if they do not agree, well, they do not agree. 11 MRS JUSTICE BACON: All right. I mean, of course, 12 nothing prevents you from raising this at the sanction 13 hearing, but it seems to me that, by Thursday, you will have 14 had almost a week to look at it, so if there are obvious 15 points. I would expect them to be raised then. 16 MR BOMPAS: My Lady, I have heard what you have said 17 and, of course, if my Lady's decision is that there should 18 be two meetings, then that will need to be factored into the 19 2.0 MRS JUSTICE BACON: Yes. All right, thank you very 21 much. So, is that your sweep—up submissions, then, Mr 2.2 Bompas? 23 MR BOMPASS: Correct, my Lady. 2.4 MRS JUSTICE BACON: Thank you very much. So, that is

the submissions from the claiming investors, so I will now

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1 hear submissions from Mr Pyatt. Am I pronouncing your name 2 correctly? 3 SUBMISSIONS by Mr PYATT MR PYATT: That's correct, my Lady. So, first of all, 4 thank you. I'm obliged to be here. I'm a private investor 5 at WEIF. I was there for one year. I am a member of the 6 7 Transparency Task Force. I am one of the leaders of the Committee for the Woodford Claim that we have. I'm 8 9 representing those people. I'm also representing anybody 10 else who's contacted me. I'm also representing any private 11 investor or retail investor who hasn't had a clue what's 12 going on, which if I had a pound for every person — I'm 13 already retired, but I'd have a lot of money in my pocket. I want to present things that are factual. My learned 14 15 friends in front of me have all run the legal side of it; I'm looking at it from a perspective of fairness, fairness 16 of process and fairness for the investor, whoever the 17 18 investor is, and the cornerstone of any decision that any 19 investor will make is they must have good information to provide to them to be able to make a decision-- a sensible 20 21 MRS JUSTICE BACON: So, your submissions are going to --22

to put some real numbers in it, because there's been numbers

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MR PYATT: Well, process, communication, basically, and

banded around that are too similar and it can be confusing for people listening here, (inaudible).

are they focusing on process?

MRS JUSTICE BACON: All right. Just before you embark on those submissions, how long do you need? Because I have also got to hear, I think, two other investors.

MR PYATT: I would hope-- 10 minutes, hopefully. I 6 7 will be quite quick.

MRS JUSTICE BACON: Very good. Thank you very much. 8

MR PYATT: I had a conversation and talked about three 10 Cs: communication, classes, which has sort of been covered.

11 and the counterfactual. First off, to just talk at

12 lunchtime, I found out how the magic number of 298 came from

13 the ECA and it's to do with seven months of sales of shares

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before the break-up, and how much we would have been

15 disadvantaged, and that's how they got to 298.

16 Unfortunately, it's not been challenged. It's been used by

the company to say, "Well, we've given you 230, or 180 if we 17

18 take 50 out, which may be used elsewhere," and then the FCA

19 are saying 298. Well, the number's nothing like that.

2.0 It's -- You know, since the closure, when they closed it,

21 Link said. "We have closed this to protect the investors."

2.2 and since then, they've lost nearly a billion pounds. If

23 that's protecting investors, then we've got problems in this

2.4 country from that side of things.

> If we look at communications, the Investor Advocate to 146

my right, here, has only had 97 emails bar mine. If there's

250,000 investors or 300,000 investors, that means a lot of

3 people don't know what's going on, haven't seen it. Then,

4 we come to the communications. Unfortunately, the

5 communications that went to the platforms said, "Please issue this letter to your clients." Some of them sent 6

7 emails to -- Most of them sent them to their portal, so if

8 you go into your portal where you've got your investments,

9 you'll see you'll have a new message. Some people got an

email from a platform that said, "You have a new document," 10

and that's all it said, so it didn't tell them, "It's 11

12 important, you should look at it," etc., etc., and that

13 can't continue with this vote, and I'll come on to that vote

later on. I mean, they should have used better wording. 14

15 Rather than issue, they should have said direct

16 communications, so that was a failing by them.

17 Then we look at the numbers. I was informed by the 18 Investor Advocate that, by the end of September, only 90,000

people downloaded the PSL. That's less than 10 per cent of 19

20 the 220,000 that they said they'd found, which isn't very 2.1 good. Then, if we look at the statements from Clifford

22 Chance, that the company has got to 90 per cent of the net

2.3 asset value and 220,000 investors. If we look at the

2.4 company Hargreaves Lansdown, they are one-third of that net

asset value, and 60 per cent of the investors they found are

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1 on one platform. So, we should be able to do much better 2 for communications.

3 MRS JUSTICE BACON: Have you got specific suggestions 4 that you want to make?

MR PYATT: Yes. I'd like the company to make-- So, 5

the company here does not know who their investors are. 7 They may know about 1,000 to 2,000, whatever the number is,

8 but the majority of investors are held with platforms and

9 intermediaries. They really should have got an Access or

10 SQL or whatever database and said to all these people,

11 "Please tell us who your investors are." Of course, the

12 platforms have to go to the investors and say, "Through

GDPR, can we release your details?" 13

MRS JUSTICE BACON: Is that practical for that process 14 15 to be carried out? Can whoever it is who is not muted 16 please mute themselves. Anybody who is dialed in, please 17 mute yourself. No exceptions, please. Thank you.

18 MR PYATT: It has to be direct communications, and if 19 it takes time. If it took a month, so what? You know, we waited four and a half -- well, four and a quarter years for 2.0 21 this to get to where it's got to. Most investors, a lot of

2.2 investors, are just blasé about it. They've either written 23 it off or they can't be bothered. It's just been so long in

2.4 the tooth they've just given up. The other thing is the

2.5 investors who don't know this is going on don't realise that

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if the vote goes ahead and the Scheme is approved by the vote and by the court, then it will be binding on every 3 creditor who holds WEIF shares after the closure date. So, 4 if you're going to get 4p or 6p or 5p in the pound, then 5 that's what you're going to get, and it's just done to you, so we've really got to get out there to the investors. If 6 7 there's 250,000, we need to get to them. 8 MRS JUSTICE BACON: So, are you saying that what they 9 need to do is ask all of the platforms to provide them with 10 a list of the contact details for all of the investors, and those should then be contacted directly by the company? 11 12 MR PYATT: Yes. MRS JUSTICE BACON: By post or email? 13 14 MR PYATT: Both. Well, it depends. If they've got 15 email, by email, or by post if they haven't got emails. The 16 majority of people who've got platforms will have an account, which means they will have an email. People. 17 18 through intermediaries, may have just done it via post or

19 whatever, especially the older investors. I also want to

talk about WEIF. Why did I, and why did hundreds of 20

2.1 thousands of other people, invest in the Woodford Equity

2.2 Fund? It was a retail fund, as defined by the FCA, which

meant it holds stocks, shares - same thing - bonds and some 2.3 2.4 are liquid stocks. We know there's a risk, but towards the

end -- not even towards the end, before it closed, it went

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well away from that. Other people knew about this, not in this room, but in different institutions, and did nothing about it, hence the losses are so great, if you go back four years, we're nearly at a level of two to three billion pounds of (inaudible) losses. Some are due to selling of shares -- I mean, when they closed the fund, it took so long that they decided to do a fire sale of all the quoted stock and, of course, most of those quoted stocks went down in value because people knew there was going to be a run on those shareholdings.

MRS JUSTICE BACON: The reasons why the fund failed are not a matter for me today.

MR PYATT: No, okay, yes, thanks for that. Restitution order, there's been three mentions of restitution order in front of me here. As a private investor, another private investor, we want the FCA to take the company—— not to the cleaners, but to look back beyond the closure of the fund. So, this Scheme is only looking at the front for four years since the Scheme. It should be looking at the four/five years before the Scheme, because the losses on both sides of that closure were the same. So, if this fails, then the FCA could do a restitution order for both pre and post, as my

2.2

23 learned friend had spoken in front of us.

Another number that came up this morning was said about Leigh Day and Harcus Parker, and that they've got about

11,000 investors, which—— the claim is 300 million. They've

actually got 20,000 investors, so that number's more like

3 500 million, so that's a significant sum. Right, the voting

form. Unfortunately, I've not seen the voting form, I've

5 only heard about it third-hand, and from what I gather - and

there's going to be a meeting about it - if this form has to 6

7 be dragged down from a website, only 19,000 people have been and downloaded the PSL. That isn't going to go to a lot of 8

9 people, and by the way, there are 24,000 people with lawyer

10 firms, such as Leigh Day, Harcus Parker and RGL. I suspect

11 the majority of those went to the site and downloaded the

12 PSL. So, outside of those numbers, there aren't that many

13 people being involved in the process.

15 come in, if this goes forward, that we look at the

I would ask my Lady that, when the voting actually does

16 statistics of who voted from which class -- if we have two

17 classes, which I (inaudible) do, how much the votes were

18 from both sides of the house. The only thing I'd like to

19 say about classes is there is a definite economic interest

difference between myself and an institution. I have 20

2.1 access, hopefully, to the financial conduct services Scheme,

22 retail — sorry, the (inaudible) investors do not. 2.3

Next, I'd like to come on to the platforms, those 2.4 lovely platforms. If you're a private investor or a retail

25 investor, you can have direct shares in WEIF, or you can be

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1 in what's called a multi-manager fund, a fund where Woodford

shares or Link shares are part of an overarching product,

3 and it's been termed in the document as being the, "First

fund," so the first fund gets to vote. Now, in financial

circles , there's something called a DFM. So, a DFM is an 5

individual or a company who manages your portfolio on your 6

7 behalf, so if they want to buy shares here, there and

8 everywhere, they just do it, they don't actually ask you to

9 do it, but for this, it's going to affect nearly a quarter

10 of a million people. Those platforms or those MMS should go

11 back to the investors to litmus test them, to see whether

12 they thought this or not, and not just arbitrarily take the

vote away from them and say, "We're going to do this." I've 13

14 had instances - and I think it's been already mentioned -15 regarding a particular company who just said. "We'll do it

16 on your best interests. We'll make a decision for you,"

17 which is unfair for investors.

18 Lastly, it's been quite opening today about the

19 Investor Advocate's role and the FCA. From an investor

2.0 perspective, a private, retail investor perspective, we

2.1 thought the Investor Advocate was there as a champion for

2.2 the investor, and the FCA definitely should be the champion

23 for the investor. Unfortunately, there's been a--I2.4 wouldn't call it a marriage but a relationship - maybe

2.5 physical or not, I don't know - has been taking place, and

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1	tale all heldered decorated as a factor of the second decorated and the second decorated as Market	1	MC TOURS. We want have the control by
1 2	it's all behind closed doors. It's all confidential. We'll just hush it up. Neither the company nor the FCA want this	1 2	MS TOUBE: Yes. We must have their emails because we would have handed them over.
3	to go to litigation . They are desperate to get this through	3	MRS JUSTICE BACON: Well, yes, and it is from you that
4	the vote. I've put here, "Single share class, why, why,	4	I understood that those are the parties that want to make
5	why?" Now, I know, my Lady, you said it's not really for me	5	submissions, so you will have their contact details.
6	to know why, why, why, but they're fighting it so hard,	6	MS TOUBE: Yes.
7	there must be a specific reason they know they have to do	7	MRS JUSTICE BACON: All right. Are there any—— Yes?
8	this to get it through. I think that's me over for now.	8	MR PYATT: My Lady, can I just—— One important fact
9	MRS JUSTICE BACON: Thank you very much.	9	I'd like to ask and to mention.
10	MR PYATT: Thank you very much. That took 10 minutes.	10	So, last week, the FCA had their open public meeting
11	That was good timing.	11	where Therese Chambers stood up and supposedly called
12	MRS JUSTICE BACON: Thank you very much for your	12	(inaudible) my learned friend at the back here, said, "If
13	concise submissions and your written submissions. Can I now	13	this Scheme is approved, when it's approved, we will release
14	just check, has Mr Pyatt's written submission been	14	our report that's taken four years to do." She didn't say
15	circulated to everyone?	15	the last bit. Now, that report has material evidence that
16	MS TOUBE: Yes, my Lady.	16	investors must see, because — I start at the beginning — to
17	MRS JUSTICE BACON: All right. What about Mr Pyatt's	17	make a good decision, you need good information. The
18	concern that he hasn't seen the voting form? He has now	18	FSC(sic) report needs to come out before the vote so that
19	been sent a copy of the skeleton arguments that he didn't	19	people can people can look at it and make their own
20	have, and the hearing bundle, and the authorities bundle.	20	decisions, because at the moment, it's being skewed.
21	Is there anything else that he should have?	21	MRS JUSTICE BACON: Yes, that was a point that was made
22	MS TOUBE: I thought he had it, but if he does not, we	22	in your submission, and I would hope that that can be
23	should obviously give it to him so he can look at it before	23	addressed in the reply submissions from the company and the
24	Thursday.	24	FCA.
25	MRS JUSTICE BACON: Yes. What about anybody else?	25	MR PYATT: If you get it out of them, my Lady, you're
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1	Because although he is now being sent the hearing bundle so	1	doing very well, because we've been asking for it for years.
2	he can see what is being referred to, I am assuming that	2	MRS JUSTICE BACON: Well, I am going to just ask them
3	other investors who are making submissions will not have had	3	for submissions on that. All right, so thank you very much,
4	that.	4	Mr Pyatt. Now, I am willing to hear from Mr Allan and Mr
5	MS TOUBE: No, I do not think anyone has asked us for	5	Dickenson to the extent that those wish to make points that
6	it.	6	have not already been made today, but I would ask for very
7	MRS JUSTICE BACON: Right, but is it the case that, if	7	brief submissions of no more than five to ten minutes. Are
8	anyone wants to see that before Thursday, they can ask you	8	Mr Allan and Mr Dickenson on the video feed? Is someone
9	for it, so that they can participate as necessary at the	9	able to contact them and let them know they can speak now if
10	consequentials hearing?	10	they want to? Mr Dickenson.
11	MS TOUBE: Yes.	11	MR DICKENSON: I should be switched on now, Mr
12	MRS JUSTICE BACON: And similarly with the voting form?	12	Dickenson, yes.
13	MS TOUBE: Yes, I think that is important. If he does	13	MRS JUSTICE BACON: Yes, we can see you and hear you.
14	have any useful points for us on the voting form, we would	14	Can you see and hear us?
15	obviously like to see that.	15	MR DICKENSON: Yes, I can hear you.
16	MRS JUSTICE BACON: Yes, and if the two other investors	16	MRS JUSTICE BACON: Thank you. So, do you want to make
17	I am about to hear from also have points on the voting form,	17	any submissions that you want in the next five to ten
18	you will want to hear that, and then if that is not resolved	18	minutes?
19	before Thursday, I will want to hear that as well.	19	SUBMISSIONS by Mr DICKENSON

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MRS JUSTICE BACON: So, can I leave it to you to liaise

with Mr Pyatt and—— I am just going to get their names up.

MS TOUBE: I think it is Mr Dickenson and Mr Allan.

MRS JUSTICE BACON: Mr Allan and Mr Dickenson, to

ensure that they have the documents that they need.

MS TOUBE: Yes.

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 $\label{eq:mr} \mbox{MR DICKENSON: Yes, please. Firstly, thank you for}$

allowing me to speak. My name is Graham Dickenson. I

in the Woodford funds. I'll try not to duplicate, but

represent myself and my wife. We both have direct holdings

please bear in $\,$ mind I don't have the court bundle, and I've $\,$

not been able to hear significant $% \left(1\right) =\left(1\right) \left(1\right) =\left(1\right) \left(1\right) \left(1\right)$

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will try and get through as succinctly as possible. What I'd like to put to you is an understanding of the Scheme 3 from the viewpoint of one of the many thousands of investors 4 whose pensions and savings have severely disrupted. Very briefly. from our point of view, we have put in 5 approximately £97,000 into the funds. At the end of 2018, 6 7 and during the period where FCA have identified that the 8 mismanagement had started to occur, that had dropped to 9 about 87,000. So, I think part of that drop would be normal investor risk. Some of it is probably down to the 10 11 management shortcomings.

12 A month or so after the closure date, we were down to 13 70.000, and we've received, to date, about 51.000. So, by my reckoning, we're approximately 30,000 to 35,000 short. 14 15 My best calculation, from the limited information available to me, is that we might get £5,000 to 6,000 pounds if we're 16 17 lucky, so there's quite a gap between what we think we've 18 lost and what we think we'll get. There has been a lack of 19 clear information and communication from Link, and the communications are littered with, I think, false 2.0 2.1 reassurances. By direct reference to the Link letter of 28 2.2 July, it says there that, "LFSL has entered into ongoing 2.3 discussions with relevant stakeholders to further develop 2.4 the detailed terms of the Scheme." Now, to my mind, the most numerous and the most relevant stakeholders are the

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creditors, and I'm not really aware of any substantive discussions that are ongoing with those other than the very limited remit of the Committee it set up, whose members I don't think we know, and whose report is not yet available to us. So, I'm not sure what ongoing discussions are referred to there, but I have to say that most of the correspondence is littered that sort of phraseology. We're

MRS JUSTICE BACON: I am sorry, Mr Dickenson, what committee are you referring to?

MR DICKENSON: Sorry. The letter of the 28 July, which was sent by LFSL to investors, but that came via an investment platform rather than directly.

MRS JUSTICE BACON: Yes. You just said that there had been no substantive discussions with creditors other than with a committee. Were you talking about the Transparency Task Force, or———

17 Task Force, or ———18 MR BOMPAS(?): The Investor Committee?

MRS JUSTICE BACON: The Investor Committee, I see.

MR DICKENSON: The Investment Committee it set up, but

I think that has a limited remit in what it can do. So, as

22 investors, or as creditors, we're faced with being forced to 23 vote in the near future on what looks like, on the face of

vote in the near future on what looks like, on the face of it. a very inadequate amount, and an amount that remains

it, a very inadequate amount, and an amount that remains
 extremely uncertain. There are unexplained decisions handed

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of this has been discussed or challenged in any effective 3 way. It appears to me, as one of the creditors, that the 4 Scheme is geared to what LFSL can afford, and from FCA's 5 point of view, just to close this down cleanly, possibly excluding other sources of restitution, perhaps the FSCS. 6 7 There are several very specific concerns. Firstly, the amount. I referred to the LFSL letter of July. There is a 8 9 later one of 7 September, which isn't on their website yet, 10 as far as I can see. That refers to NAV, net annual value. 11 of the fund. £3.6 billion at the suspension date, and that there have been proceeds of £2.56 billion paid since then. 12 13 Now, to my simple maths, that leaves something north of £1 14 billion as the shortfall, but then, later on, we have, 15 without explanation of how it's arrived at, an assessment of 16 the loss 298 million. So, that's a huge concern to those of 17 us that have been asked to vote about it. How has that 18 figure been arrived at where, on the face of it, it's less 19 than a third of the loss that's covered in the same letter? 20 The final amount remains very uncertain. It depends on the 2.1 sale of the company. It depends on other unknown 2.2 litigation . It depends on expenses and expenditure that 2.3 seem to be entirely at the discretion of LFSL (sic).

down by FCA, which are the basis for all of this, and none

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I can't see any sign of any oversight or control of

that expenditure, and there's a £50 million reservation for

1 that, so rather than keep saying, "We could get up to 230million," it would be fairer to say, "We should bank on 180 2. 3 million, but if we're lucky and they don't spend the 50 million, we'll get a bit more." It's just how you put that 5 into the letter and the language. I'm also concerned with the start date of the loss calculation. FCA has ruled, 6 7 apparently, that the behaviour leading to the loss started 8 during the previous year. However, they've set the 9 calculation date from the date of closure. What about the 10 losses that were incurred prior to that closure? We, as 11 creditors, have been unable to challenge or even discuss the 12 FCA approach to this. It has simply been handed down and 13 everyone's running with it now as the way forward, but there's a huge gap in terms of our understanding and 14 acceptance of it. I'm concerned that FCA have only made a 15 16 partial determination after all these years of deliberation, 17 and it appears to be quite focused on heading off any 18 further claims and tying investors up with this Scheme. It 19 makes me wonder, is there a conflict of interest here? Is 2.0 FCA trying to balance the interest of creditors it's 21 supposed to protect, or is it protecting the public purse, perhaps? I don't know. 2.2 23 On the figures that FCA put forward, the smallest

shortfall , at best, is 68, but if any money is taken out of

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shortfall fall is 298 million, less 230 million. So, the

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than 68 million. It seems to me that this uncovered loss is 3 a natural subject for FSCS to address, and surely FCA should 4 have involved FSCS in this matter long since, and surely we 5 should know, before we have to vote, what the FSCS position is on this, and what the risk is to us as to whether there's 6 7 any prospect of getting anything else, or do we sign our rights away forever by signing this Scheme? There are too 8 9 many questions like this outstanding. Another question \boldsymbol{I} 10 have is why is the insurance figure so low? We're told it's 11 £48 million. Now, here we have an organisation licensed, as I understand it, to manage £82 billion worth of funds, and I 12 13 believe this fund was somewhere around 12 or 13 billion at 14 its height, and it seems to me that insurance cover that 15 only covers to 48 million is woefully short. Does FCA not 16 have a role in making sure companies that it licenses have adequate cover and we don't have this sort of shortfall? 17 18 The other thing is that the Link Group, like many companies, 19 limits its liabilities by compartmentalising its business into sub-companies which have limited assets, as we see 2.0 2.1 here. How is it that it is allowed by our regulatory system

that reserve 50 million, then the shortfall will be greater

The other thing that concerned me was that there is no 161

overseen by FCA? How are they allowed to trade without

being underwritten by the bigger group resources? That

seems to be another shortfall here.

1 reference really throughout the correspondence being put 2. out, apparently with the blessing of FCA, to the possibility 3 that's been raised by others, and which I agree with, that an action could proceed. It would establish that LFSL may fail to meet its liabilities , and it would fail , and the FCA $\,$ 5 could then use a restitution order to put unrecovered losses 6 7 to FSCS. It seems to me that that's been entirely ruled out 8 as a solution. I have a minor question as a platform holder through a platform. Will I actually get to vote as 9 10 an individual on this or will the platform use my vote? 11 There seem to be a lot of uncertainties here for which there are questions. 12 So, I've (inaudible) through a bit. In conclusion, I have to say that I'm very surprised at the extremely limited

13 14 Creditor presence here at this very important hearing, and I 15 16 think it reflects the real difficulty faced by Creditors in following and engaging with this process. I mean, frankly, 17 18 most people haven't got a clue what's going on, and the 19 previous speaker alluded or mentioned the failure to 2.0 properly communicate with Creditors. It does put a very 21 heavy burden on your Ladyship to look after the interests of 2.2 those Creditors who may be forced by this Scheme to arrive 23 at voting on something where there are so many unknowns and 2.4 unexplained questions, where the return looks extremely

poor, and it has all the hallmarks of something being put

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through at great pace and with great determination and

without really consulting or taking account of the interests

3 of those who will be affected. The Scheme seems to me to be

very keenly focused on the needs of the Link Group and its 4

sale and the wish of the FCA to tuck this away and fold it 5

all up and move on, and I feel that we will be losing out as 6

a result of that approach.

7 8 I think your decision, therefore, must ensure that the 9 agendas of LFSC (sic) and FCA do not take precedence over 10 the interests of us Creditors. We must have, please, 11 adequate time to see all of the support and background and 12 documents and calculations. The latest thing on the website 13 at the moment is the letter 28 July. We must have a proper 14 explanation of the quantum calculations and some opportunity 15 to challenge and discuss them. No vote should be imposed 16 until the various uncertainties, especially those revolving 17 around these reserve costs, the sale price of LESC, are 18 contractually firmed up and more certain within very tight parameters. It would also be preferable, surely, to have

19

20 involved FSCS and to have a more certain outcome from that

2.1 organisation available to inform our vote on this Scheme,

22 and I think, your Ladyship, that the timetable from here 2.3

should make provision to do exactly that. Currently, based

2.4 on the incomplete information, the uncertain outcome and the

very low perspective payment, personally, I would not feel

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1 I'm risking very much to say, "Well, no," not to this

2. Scheme. I'd rather take my chances of a better recovery

3 through an action. I must simply ask that your

determination takes these points into account and that you

issue directions and a timetable to ensure that this is done

properly and without undue haste to the detriment of the 6

7 shareholders and the investors. Thank you. That's all I've 8 got to say

9 MRS JUSTICE BACON: Thank you very much for your very 10 helpful submissions, Mr Dickenson. That leaves Mr Allan. 11 Is Mr Allan online? Is Mr Allan there? In the courtroom we 12 are hearing some sounds, but we cannot hear Mr Allan. If 13 you are not Mr Allan, can you please mute? If you are Mr 14 Allan, can you please come online so that we can see you and 15 hear your submissions? Is anyone in contact with Mr Allan? 16

MS TOUBE: We did send him an email, but we have not 17

18 MRS JUSTICE BACON: All right. Well, Mr Allan has been 19 invited to make submissions. I understand that he has been

sent a link. Can someone tell me if he is actually online? 2.0 2.1 And can whoever it is who is not muted please mute

2.2 themselves? We are getting a lot of noise this end. No.

23

2.4 MS TOUBE: I am afraid we do not have the link, so we 2.5 cannot see who is online.

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1	MRS JUSTICE BACON: No. All right. Can somebody	1	Certainly, he has not asked for it again today. He has now
2	please send my clerk an email?	2	been re—sent it or sent it for the first time; we are not
3	MR PYATT: He is not online. I am told by the FCA.	3	entirely sure. What I am going to do is to resume the
4	MRS JUSTICE BACON: All right. Thank you. Can someone	4	hearing. If Mr Allan has now joined, he should make himself
5	please send my clerk an email to ask her to mute anyone who	5	known. Otherwise, what I will do is I will give you a
6	is online? Thank you. So, Mr Allan has been given an	6	chance to make your response submissions, Ms Toube, and then
7	opportunity to attend. I understand that he has been sent	7	I will ask again if he is there before the end of the
8	the link. Can anyone confirm that———	8	hearing.
9	MS TOUBE: The link would come from the courts, so we	9	MS TOUBE: Thank you very much.
10	do not know the answer to that.	10	MRS JUSTICE BACON: So, I am assuming that the reply
11	MRS JUSTICE BACON: Right. Has anyone had any $$ well,	11	will be from you and insofar as necessary only from Mr
12	has anyone had any communications with Mr Allan today? I	12	Smith, but I am assuming that Ms Cooke is not going to
13	think I might just rise to make enquiries as to whether he	13	reply. Is that right?
14	has been sent the link and whether he has been at all on	14	MS COOKE: That is correct.
15	today or whether he has just chosen not to attend. When did	15	MRS JUSTICE BACON: All right.
16	you last hear that Mr Allan wanted to make submissions?	16	MR BOMPAS: My Lady, may I just to raise the point, I
17	MS TOUBE: On Sunday evening.	17	am not actually sure why Mr Smith would be replying.
18	MRS JUSTICE BACON: All right, and was he included in	18	MRS JUSTICE BACON: Well, there were various points
19	the list of people that you sent to my clerk?	19	made about the FCA's role. I am not encouraging him to make
20	MS TOUBE: Yes.	20	lengthy submissions, but if it is necessary to reply to
21	MRS JUSTICE BACON: So, it is reasonable to assume that	21	anything that you said, I would wish him to have a right of
22	he would have been sent a link.	22	reply.
23	COUNSEL: There is an email address that looks relevant	23	MR BOMPAS: Very well, of course.
24	on what your clerk sent out. It reads as though it would be	24	SUBMISSIONS in reply by Ms TOUBE
25	his looks like it is his name @btinternet.	25	MS TOUBE: My Lady, I do not have a huge number of
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1 MRS JUSTICE BACON: All right. I am just going to rise 2. for five minutes to make sure he was sent the link. If he 3 was sent the link but does not come on, then I am just going to carry on. We do need to finish the hearing this evening. Is everybody all right to sit a little bit late? All right, 5 and while I have risen, you might just take the opportunity 6 7 to discuss between you some of the points that Mr Pyatt and 8 Mr Dickenson have made regarding the logistics because I 9 would be grateful for your responses on that, including — I 10 mean timing may be something that we can revisit on Thursday, but there seem to be some fundamental issues, such 11 12 as individual platform vote and the information that is 13 provided to the investors ahead of the vote, which it might 14 be useful to just trail now in so far as progress can be 15 made. 16 MS TOUBE: Yes, that may also come out of the 17 discussion that we are having on the voting (inaudible) 18 before Thursday. MRS JUSTICE BACON: Yes, I understand. All right. 19 2.0 Well, I will rise for five minutes, and then we will resume. 21 (4.15 p.m.) 22 (Short break) 23 MRS JUSTICE BACON: It seems that there was some lack 2.4 25 of clarity as to whether Mr Allan had been sent the link.

1 points arising out of Mr Bompas's submissions, and I 2. certainly do not want to repeat points that I made in the 3 opening. If I can start with the main point, which is the class point, I do not really have anything more to say $\mathsf{against}--$ in relation to the good versus bad claims. There 5 6 is nothing in the authority to support that as a reason for 7 dividing a class, and as your Ladyship pointed out, this 8 court is not in a position to determine which is a good or a 9 bad claim in any event. So, the class points really relate 10 to this issue of whether or not the relevant rights are, as 11 we say, the rights against the company or can also take into 12 account rights against the third parties, and again, there 13 is nothing in my learned friend's submissions that changes 14 the position as I put it to your Ladyship this morning. 15 There is nothing in the authorities that supports what he 16 says 17

He attempted to distinguish UDL by saying that the character of the claims there were different, but in UDL all employees had this $\operatorname{claim}--$ potential claim over, which would then lead to a substitution by another Creditor coming in if that Creditor paid first, and that is exactly the position as it would be if the FSCS were pay. So, a Creditor would say, "Well, I will go and collect from the FSCS first, please," and the FSCS would then subrogate into an assigned claim. So as far as the company is concerned, it has one

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claim. That is the underlying Scheme Creditor's claim against the company. If there is no FSCS claim, then of 3 course the FSCS does not come in at all, but this is no 4 different from an individual investor who has insurance or a 5 guarantee or joint liability or any other thing, which is a right against a third party. Those are not rights that the 6 7 court looks at when determining questions of classes. 8 MRS JUSTICE BACON: I think, if I understand it, the 9

submission in relation to UDL was being put on the basis that in this case it was a case where the right — the third-party right was derivative on the right against the company. That is my understanding of at least part of what Mr Bompas was saving.

MS TOUBE: Yes, and what I am saying is if that is right, then the same was true in UDL. Yes, and indeed Gate Group. So, what the court has said is that those are interests not rights. One looks only at the right against the company, and you will recall that Mr Smith drew your attention this morning to a call and said, "Well, when one is looking at these rights, one looks at the question of what would happen in an insolvency, and in an insolvency there would be a claim against the company." What an individual might go off and do and recover from the FSCS or do something else would be a matter for it, but it is not. in any of these cases, a question of what are the rights

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1 there might be against their parties.

2. In Gate Group, for instance, you will recall from a 3 passage that my learned friend showed you that what happened in that case was that the court took the view that one could 5 look through the artificial deed of contribution structure, which we put in place in that case, and say, "Well, there 6 7 are different rights against the company coming out of the 8 plan," and so there were different rights out, and so the 9 classes were split for that reason. Not that there were 10 different third-party rights or any other issue like that. 11 The court looked at rights against the company coming in, 12 rights against the company going out, and that is always 13 what it does, and just as an aside, that is the same in Hawk. I think my learned friend suggested in Hawk that 14 15 there were split classes depending on what insurance people 16 had. That was the decision at first instance by Mrs Justice Arden, as she then was. That was appealed, and in the Court 17 18 of Appeal, the Court of Appeal said, "No. There is one 19 class. She has got it wrong. In fact, the rights are not 2.0 so dissimilar as to make it impossible for these parties to 21 consult together.

MRS JUSTICE BACON: Is this a situation, as suggested by Mr Bompas, where the rights of the individual Creditors. the retail investors, might or would be adverse to those of the institutional investors?

MS TOUBE: Well, it is difficult to know the answer to 2 that question. They are all unsecured Creditors. They all 3 have an interest in recovering sums from the company which they would be able to prove for. They might have different 5 interests from one another, but they do not have different rights. 6

MRS JUSTICE BACON: And it is not a situation of 8 adverse rights in that it is a zero-sum game as against the company, so that if one recovers more, then the other will 10 recover less, rather it is a question as to whether the retail investors might have an additional claim against the FSCS to put them in a better position.

12 13 MS TOUBE: So just to unpick that, if what one is 14 looking at is only rights against the company, one leaves 15 out of account, for the purposes of class composition 16 position, the question of the claim against the FSCS. 17 Different interests that people have may be relevant to 18 questions of fairness which will be considered at sanction, 19 but they are not matters which split the class. In any 20 insolvency, Creditors will have different claims for

different amounts, and the only question is how is that 22 dealt with? And some of them may be stronger claims, some

of them and maybe weaker claims, as your Ladyship saw from 2.3 2.4 the passage from Cimolai and Noble, so what one has is

different sorts of claims which may have different values.

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Now, in an insolvency, they are all dealt with $\mathsf{pari}\!-\!\mathsf{passu}$ at 1 2. whatever value they are, but they are all the same rights 3 against the company in the sense that they are all unsecured, contingent Creditors, remembering, of course, 5 that they are all disputed by the company. 6 MRS JUSTICE BACON: So, your point is that once the 7 debt has been proved in the insolvency, which has been 8 commented in one of the cases that may be a complex process, 9 but once that is been proven, the cause of action does not make a difference. MS TOUBE: No. MRS JUSTICE BACON: It is going to be pari-passu.

10 11 12 13 MS TOURF: Yes MRS JUSTICE BACON: Yes. What Mr Bompas was saying is 14 15 that this court can. I think he said, discount or disregard 16 the claims by the institutional investors because he said 17 they were so weak. He went so far as to say that they were 18 certain to fail, that he was implying that. What is your 19 response to that? 2.0 MS TOUBE: Well, that is an assertion. The assertion

2.1 that is made, all that is happened in this case is that the 2.2 claims have been issued. There is no judgment on them-- on 23 my learned friend's claims, and so the court is just not in 2.4 a position to say these claims are better than that claims. What it has is some claims which have been brought at the

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FCA's position in relation to its draft statement, all of which, of course, are disputed by the company. So, what we 3 have is a whole series of contingent claims of different 4 kinds but all, essentially, for unsecured Creditors, and we 5 do not know what the value of any of them are, and we do not know if any of them are good claims or bad claims. We just 6 know they have been asserted. So, my learned friend says, "Well, it is easier for me to establish this," and the 8 9 answer is who knows, and the court cannot possibly tell. 10 MRS_IUSTICE_BACON: Yes

MS TOUBE: So, that is the position in relation, I think, to those. There was one point I was going to make on Cimolai, and Mr Al—Attar reminds me of two points. First of all , your Ladyship saw, I think, from the passage we looked at earlier that the court said that this was a very unusual case in which it was going to split a class , and this was a submission by the company that it should split a class in this particular way, and it split a class of disputed creditors because this particular class , and just for your reference, you will see this from para.7 of the judgment, which is 476 of the bundle, but this particular class had huge potential counterclaims.

huge potential counterclaims.
 MRS JUSTICE BACON: Now, was Cimolai the one where
 there was a comment about the different outcomes of
 litigation and the different parties having different

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1 strategies in litigation? 2 MS TOUBE: Yes. 3 MRS JUSTICE BACON: Yes, I remember that passage. MS TOUBE: Yes. MRS JUSTICE BACON: So you say it is that one group of 5 6 creditors had large counterclaims? 7 MS TOUBE: Yes, against them. Yes. As Mr Al-Attar 8 reminds me, that this was a case in which, in fact, the 9 counterclaims were so large that they were actually better 10 off if the company went into liquidation, which was a 11 completely different position from the other creditors, and 12 the court said, as your Ladyship saw at paras.52 and 53, 13 that this was a very unusual case, where the judge had said, "Normally, we would treating all these people as if they 14 15 were the same," and that is the passage we cited in our 16 skeleton.

MRS JUSTICE BACON: Yes, and in this case, there is no suggestion from anyone that any group of creditors would deserved if the company goes into liquidation. Rather, that depending on where the FCA comes out and depending on the overall assets that have been available, some of the investors may then have an FSCS claim and there may be further individual claims on top of the FCA distribution, but as Mr Bompas conceded, that might not be the case for all of the investors.

1 MS TOUBE: Yes.

MRS JUSTICE BACON: Yes.

3 MS TOUBE: And then I think he made one point on Apcoa.

 $4\,$ $\,$ He relied on the passage where the judge expressed his view

 $5\,$ $\,$ that there might sometimes be a blurred boundary, but your

6 Ladyship will have seen that, again, that was in the context

 $7\,$ of rights out. So the court would say sometimes there is a

8 blurred boundary between what these rights are when there
9 are rights conferred under the Scheme So. I think that is

9 are rights conferred under the Scheme. So, I think that is

 $10\,$ $\,$ all I had to say on Mr Bompas' points, unless your Ladyship

11 having further questions for me on those?

MRS JUSTICE BACON: Well, on that last point, you were saying that this is not about the rights conferred by the Scheme, this is about the pre—existing rights against the company. What about the point that although the Scheme itself does not provide for the FSCS compensation claim to be extinguished, it has that effect de facto? So one might be looking at different types of rights out under the Scheme.

MS TOUBE: Well, they are not different rights out because the Scheme treats everybody in exactly the same way.

22 There is no release of the FSCS claim under the Scheme.

23 What there is is if there is no claim, because it is

24 released, there is no possibility of an FSCS compensation,

but there is no possibility of FSCS compensation if there is

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1 no valid claim in any way.

2 MRS JUSTICE BACON: Yes.

MS TOUBE: So it is not something that is happening
under the Scheme at all, and again, just to restate, if
there is any issue to be raised in relation to the FSCS
point, that is an interests point. Again, it is a matter
that can go, if anything, to fairness, and it is a matter
for sanction, but not a matter for class.

MRS JUSTICE BACON: All right, thank you.

MS TOUBE: I am not going to say anything about voting forms or timing now because I hope we can sort out some of these points before Thursday. I just did want to say one point, because I know that a number of people, including Mr Bompas, have made this point about not sharing information—sharing information with the FCA, but not sharing the drafts of the explanatory statement with the creditors. The FCA is not a creditor. Obviously, the FCA is the regulator, and it is important for us and also for the Scheme Creditors that the FCA should be involved and be content with the process that is going ahead.

There is quite a lot of dicta in the cases about not sharing information unequally between your creditors. So, in fact, we cannot advantage one group of creditors, unless there is a steering committee or other notice like that.

5 So, for example, the Investor Committee, we can share, could

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share, and did share with them specific information, but we are actually instructed by the authorities not to give information to some creditors and not to others. Now, the result of that, of course, is that people do not get to see it until the bundles filed leave court, but I would hope, bearing in mind the points that have been already picked up, that if there are any points, people will pick them up and share them with us.

MRS JUSTICE BACON: Yes, I mean, there are some specific comments about the information that is given, in particular raised in Mr Pyatt and Mr Dickenson's submissions, which I think will need to be addressed, in particular, they were concerned that they will not know before voting what the FSCS position is, ultimately.

 $\label{eq:mstar} {\sf MS\ TOUBE:\ Yes.\ They\ will\ know\ that;\ they\ do\ know} \\ {\sf that},\ {\sf because\ the\ FSCS's\ position\ is\ it\ \ cannot\ say.}$

saying that that is not going to improve before then. What about the FCA statement, or determination, which I understand will be made, on your hypothesis, after the Scheme has been approved? Now, Mr Pyatt said that should be released before the court meeting.

MRS JUSTICE BACON: That is not right. So you are

MRS JUSTICE BACON: If I can ask Mr Smith to answer that. We have no concerns from the company's point of view, but there are statutory confidentiality issues, as I

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understand it. I do not know where the FCA has got on this,
 but perhaps Mr Smith can answer that.

MRS JUSTICE BACON: Well, yes, I will come to Mr Smith in a minute. So, you do not have a concern about the release of the FCA report before the court meetings?

MS TOURE: If the FCA thinks fit, then we are content.

MS TOUBE: If the FCA thinks fit, then we are content with that.

MRS JUSTICE BACON: What about the general point as regards information about how information is got to the creditors and the difficulties of the investors in getting information from their platforms, if the platform simply posts up a message which may be on its face in quite generic form on the platform portal?

posts up a message which may be on its face in quite generic form on the platform portal?

MS TOUBE: So, the first point, I suppose, is that these are investors who have chosen to invest through intermediaries using a portal, and so their normal way of having communication from the company is through the portal, and so, as with all other schemes in fact, that is the way in which we have sought to communicate with them. We have also expressly sought to communicate with the intermediaries asking them to pass on the information and we have advertised. My concern is that anything else we do will be some sort of ad hoc process. It might end up communicating

differently with different sets of Scheme Creditors, and we

would be reluctant to have that happen. In relation to the 178

suggestion that we could contact the portals and ask them to give us all the underlying email addresses, we would suspect that is a data protection issue in any event. So our concern with that is that if we try to communicate with investors in a way differently from the way in which they are normally communicated with, that will actually cause more problems than it solves.

MRS JUSTICE BACON: Yes.

9 MS TOUBE: Of course, if anybody has suggestions as to 10 what else we can do, we will do so. We want people to come 11 along and vote.

12 MRS JUSTICE BACON: Yes, and at the very least are you 13 able to get out a message before the court meeting meetings, 14 such that if individual investors want more information, 15 particularly, for example, the point being made about the 16 way in which the 298 was calculated, which was set out in 17 one of the documents in the hearing bundle? Now, that came 18 out today. I think Mr Pyatt had not seen that before; Mr 19 Dickenson still, when he made his admissions, had not had access to the hearing bundle. Are you able to ensure that 20 2.1 anyone asking for that is able to receive it? MS TOUBE: Yes, we would not have any problem with 22 2.3

3 sending a message to the———
4 MRS JUSTICE BACON: To the portals?

24 MRS JUSTICE BACON: To the portals?
25 MS TOUBE: —— portals.

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1 MRS JUSTICE BACON: Yes. That question was not 2 directed at the question of how to communicate, but could a 3 message be got out via the means that you have specified to 4 ensure that investors can obtain the material they want to 5 comment?

comment?

MS TOUBE: Yes, we would be able to do that.

MRS JUSTICE BACON: And what about the question about platform voting? Is that a voting form issue, or is it a sort of higher level question which we can address now?

MS TOUBE: So, I think there are two issues. The

higher level issue is the one we have already discussed, which is what is the best way actually to get hold of Scheme Creditors? Is it through their portal at all?

MRS JUSTICE BACON: Yes.

MS TOUBE: The other question, which I think that Mr
Dickenson was alluding to, and I think it was in the Leigh
Day letter, they said that some of the intermediaries had
sent out a letter saying, "We will vote on your behalf."

19 MRS JUSTICE BACON: Yes.

MS TOUBE: And that will depend, of course, on what the contractual arrangements are between an investor and the intermediary, so who is the scheme claim holder, but

 $23\,$ $\,$ ultimately, when it comes down to voting, it is the Scheme

 $24\,$ $\,$ Creditor who will vote. So if the intermediary is the

25 voter, so under arrangements between them and the underlying

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1	beneficial investor that is the person who does the voting,	1	MS TOUBE: But we can review that and, if possible, try
2	then that is the person who will be able to do the voting,	2	and get them to agree whatever wording. We obviously want
3	but if the person who is the underlying beneficial owner is	3	to make it as clear as possible.
4	the person who is allowed to vote separately, then they	4	MRS JUSTICE BACON: Yes, and for the investors to be
5	should be allowed to vote separately.	5	given as much information as possible———
6	MRS JUSTICE BACON: Yes, so what you are saying is it	6	MS TOUBE: Understood.
7	will depend on the contractual arrangements between the	7	MRS JUSTICE BACON: $$ in order to allow them to mal
8	investor and their particular platform?	8	an informed decision. All right. Did you want to say
9	MS TOUBE: It will.	9	anything else at this stage, not relating to the question
10	MRS JUSTICE BACON: Some platforms will vote on behalf	10	about voting rights or voting for?
11	of all of the individual investors; other intermediaries may	11	MS TOUBE: No, my Lady.
12	not.	12	MRS JUSTICE BACON: All right. Just before I call upon
13	MS TOUBE: Yes.	13	Mr Smith for the FCA to make any final comments, can I check
14	MRS JUSTICE BACON: I see.	14	whether Allan has now come online? Right, I think that the
15	MS TOUBE: And I suppose that an underlying beneficiary	15	answer to that is no. Right, Mr Smith. This is just to
16	could revoke the authority of its intermediary to vote.	16	address any points, reply points only, arising out of the
17	MR AL-ATTAR: If it is revocable.	17	submissions that have been made on the other side of the
18	MS TOUBE: Yes, right, if it is revocable, I do not	18	courtroom.
19	know. That would depend on the contract.	19	SUBMISSIONS in reply by Mr SMITH
20	MRS JUSTICE BACON: Yes. All right.	20	MR SMITH: Yes. I mean, I did not have any reply
21	MS TOUBE: But ultimately the voting form issue is	21	points to my learned friend Mr Bompas, unless you, your
22	making sure that the right person who is entitled to vote	22	Lady, have any questions for me? All I was going to deal
23	votes, and making sure that you do not get two people voting	23	with was what my learned friend had raised about the Draft
24	twice for the same vote.	24	Warning Notice, which I think is a good reference to the
25	MRS JUSTICE BACON: Yes.	25	submissions from Mr Dickenson. My Lady, so as far as that
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1	MS TOUBE: That is what we have tried to deal with.	1	is concerned, the Warning Notice, at present, is a Draft
2	MRS JUSTICE BACON: Yes. All right. As a final	2	Warning Notice. It contains confidential information which
3	question, and I know it is late, I wondered if as part of	3	has been received by the FCA. As such, there is a statutory
4	your review of the documents, the explanatory statement can	4	prohibition on disclosing the information. That is s.348 of
5	build in some of the points that have been raised by Mr	5	FSMA. Essentially, what that provides is the confidential
6	Pyatt and Mr Dickenson insofar as not already there. So,	6	information cannot be disclosed without the consent of both
7	for example, information on where they can obtain more	7	the person for whom it was obtained or if different, the
8	information about the underlying calculations or perhaps	8	person to whom it relates, and what that means in practice
9	nutting in the underlying calculations. I do not know if	9	is that you need the consent of every person to whom the

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12 MS TOUBE: I think that it does.

already, but---

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MRS JUSTICE BACON: -- if not, so that a full explanation is given or so that creditors who at least read that statement are not still left in the dark as to what the FSCS position is.

the explanatory statement recites the position of the FSCS

17 MS TOUBE: I think the answer is it already does.

MRS JUSTICE BACON: Right.

MS TOUBE: Whatever we put in the explanatory statement about the position of the FSCS, has to be agreed also by the FSCS.

22 MRS JUSTICE BACON: Of course.

 $23\,$ MS TOUBE: So, I know there is wording in it, because I

 $24\,$ $\,$ know that there were things that they did agree.

MRS JUSTICE BACON: Yes.

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10 information relates, and that is very unlikely to be 11 obtainable as a matter of practice. 12 Now, there are certain exceptions to that in s.349, but we do not consider any of them apply in this case in 13 relation to the publication of the Draft Warning Notice. If 14 15 I can just explain why that is not necessarily surprising 16 and how the procedure essentially works is that obviously we 17 are at the Draft Warning Notice stage; what would then 18 happen, as your Ladyship knows, is the Warning Notice would 19 then be issued.

So far as the Warning Notice is considered, there is a statutory prohibition on disclosure in s.391, and obviously, the purpose of that is to enable those who are subject to the Warning Notice who are referenced in it to challenge that before the Regulatory Decisions Committee, and it is only when one gets to the stage of a Decision Notice that at

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the explanatory document at p.125, para.26, which explains

that both Warning Notice, Decision Notice and Final Notice

MR SMITH: Yes. So, in terms of public----

MRS JUSTICE BACON: I am sorry, which page of the

MRS JUSTICE BACON: 125. Yes, I think that is not

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inconsistent with what Mr Smith has just said, and that is

very helpful . The clarification is helpful . So you would

be intending to issue the Warning Notice———

will be issued as soon as practical.

MR AL-ATTAR: It is p.125.

bundle are we looking at?

1	that stage it would have been made public. So under the	1	MR SMITH: Yes.
2	normal regime, you only get publicity when the Decision	2	MRS JUSTICE BACON: after the approval of the
3	Notice is issued, and one can understand the sense that it	3	Scheme
4	no doubt goes back to things like Maxwellisation, that those	4	MR SMITH: Quite. Exactly.
5	who are named in these documents and potentially the subject	5	MRS JUSTICE BACON: followed by the Decision Notice
6	of criticism that is an opportunity to challenge that before	6	and Final Notice?
7	the document is published. So, that is the basic regime,	7	MR SMITH: Yes.
8	but insofar as we are concerned, we are not at liberty to	8	MRS JUSTICE BACON: The Decision Notice and Final
9	disclose of it as a statute of the prohibition.	9	Notice would be published, but the Warning Notice would not
10	MRS JUSTICE BACON: So, can I just understand what is	10	be?
11	the procedure that you envisage will be followed if the	11	MR SMITH: Correct.
12	Scheme is approved———	12	MRS JUSTICE BACON: All right, so your point is that
13	MR SMITH: Yes.	13	there are statutory reasons why none of this can be
14	MRS JUSTICE BACON: that then gets you to the point	14	published now? Firstly, you have not actually issued a
15	of issuing something that will be published?	15	Decision Notice, so there is not something that can be
16	MR SMITH: Well, we will be issuing it; I do not	16	published, all that you have issued is a Draft Warning
17	believe we would be making it public, as I understand. If I	17	Notice?
18	am wrong—— Yes, I mean, if there was a Decision Notice	18	MR SMITH: Yes.
19	subsequent to the Warning Notice, at that point the Decision	19	MRS JUSTICE BACON: And even the Final Warning Notice,
20	Notice would be made public.	20	following the draft, is not something that would be
21	MRS JUSTICE BACON: So, what	21	published?
22	MR SMITH: The Warning Notice would not, I do not	22	MR SMITH: Yes, quite. It is exactly that, my Lady.
23	believe, be made public.	23	MRS JUSTICE BACON: Yes.
24	MRS JUSTICE BACON: Okay, so what is going to be	24	MR BOMPAS: My Lady, I am sorry, I am very confused by
25	published after the Scheme is approved, if it is approved?	25	this. I think that my learned friend is saying that the
	185		187
1	MR SMITH: So, the Warning Notice would be issued, so	1	Final Notice, along with the Decision Notice, will be
2	that would go from a draft to a Warning Notice. The Warning	2	published — — —
3	Notice would not be published. Then the Decision Notice	3	MRS JUSTICE BACON: Yes, that is my understanding
4	would presumably follow fairly quickly, because on this	4	MR BOMPAS: $$ although the document does not actually
5	hypothesis the company would not be putting in submissions	5	say that.
6	opposing the Warning Notice, and it is the Decision Notice	6	MR SMITH: Yes, I am not surprised my learned friend is
7	that is in accordance with the normal practice that would be	7	confused, that is exactly right.
8	published.	8	MRS JUSTICE BACON: All right.
9	MRS JUSTICE BACON: All right, so that is the process	9	COUNSEL: My Lady, may I rise? Why cannot we have a
10	that you envisage being followed that———	10	document that has some redaction on it? You know, we can
11	MR SMITH: If the Scheme is approved, yes.	11	get out documents from government with redactions on it. I
12	MRS JUSTICE BACON: —— after the class meeting or	12	mean, at the moment what we are saying is Mr Private
13	meetings	13	Investor is blind; we are not going to tell you what is
14	MR AL-ATTAR: My Lady, the point is actually set out in	14	going on, and then when the decisions happen and the report

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MRS JUSTICE BACON: Well, what we have got at the

MR SMITH: That is right. So, that is right, my Lady,

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comes out, people say, "My God, if I had known this, I

wouldn't have worked it this way." It just seems strange.

moment, as I understand it, is a summary that has been

various documents, including, I think, the explanatory

statement, but also the witness statement from Mr Midl.

and I mean, in answer to that point, I mean, if we were

B, we would have to redact from the Warning Notice

going to go down this exercise, looking at s.3, 4A, 1A and

agreed of what is said in the Warning Notice, and that is in

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given consent, and also, information relating to any person 3 who had not given consent. So it effectively requires 4 consent from both of the persons who provided the information, and if different, the person to whom it 5 relates. So, I mean, if one is going to do that on a 6 7 Warning Notice, that is obviously going to be a rather 8 difficult exercise ----9 MRS JUSTICE BACON: Yes. 10 MR SMITH: —— it may not need much then, and also, 11 there is the separate point of whether it is actually right 12 to do that in relation to a Draft Warning Notice, where the statute explicitly says, in relation to a Final Warning 14 Notice, you must not publish it. 15 MRS JUSTICE BACON: You must? MR SMITH: You must not publish it. You must not 16 17 publish----18 MRS JUSTICE BACON: Yes. 19 MR SMITH: -- a Final Warning Notice. On queries, why, if that is right, it could be right to publish a Draft 20 2.1 Warning Notice. MRS JUSTICE BACON: And that is s.391? 2.2 2.3 MR SMITH: That is correct, my Lady. 2.4 MRS JUSTICE BACON: Yes. All right, thank you very 2.5 much. Well, it has been a long day. I have heard from all 189

information which we have received from anyone who had not

- 1 of you. Thank you very much for your submissions. 2. Provisionally, we will be coming back on Thursday. If that 3 needs to change, my clerk will let you know, but I think we will be working towards coming back on Thursday and then dealing with the outstanding matters then. At the moment, my intention would be to give judgment on an ex tempore 6 7 basis on Thursday morning, as indicated. All right. 8 MS TOUBE: My Lady, if I just might make one more 9 point? 10 MR: My Lady, I have got a question too. A request, 11 rather 12 MRS JUSTICE BACON: Well, all right. I will hear from Ms Toube first 13 MS TOUBE: Thank you. We will obviously prepare and 14 15 discuss with the other side updates to the Explanatory Ladyship's judgment, but we were not intending to produce a
- 16 Statement. I am not attempting in any way to pre-empt your
 17 Ladyship's judgment, but we were not intending to produce a
 18 second set of documents based on two meetings. We will just
 19 continue with one for now and if———
 20 MRS JUSTICE BACON: Yes, that is the default.
 21 MS TOUBE: —— any further changes are necessary———
- MRS JUSTICE BACON: Yes.
- 23 MS TOUBE: Thank you.
- $24\,$ MR BOMPAS: My Lady, my question or query was in
- $25\,$ $\,$ response to Ms Toube's submission about the FCA having given

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creditors 3 MS TOUBE: No. MR BOMPAS: That was what I noted had being submitted. 4 MS TOUBE: No. Sorry, just to make it clear, that 5 comes from the authorities. The cases make it clear that 6 7 one should not share different sets of information with different creditors. Of course, now we have had a hearing, 8 9 and there is a hearing bundle, that is not an issue. That 10 was just my explanation. 11 MR BOMPAS: Well, what I am actually concerned about is 12 that if we do not get into some difficulty with my learned 13 friend saying, "Oh, by the way, these authorities prevent 14 communications about the matters that we want to be talking 15 about in order to get this thing moving forward one way or another from"----16 17 MRS JUSTICE BACON: No, there is a hearing. Any of the 18 creditors could have come along and made submissions at it 19 and asked for the materials to be provided. Any of the 20 creditors who are interested can ask Clifford Chance to be 2.1 involved in the process of commenting on the voting form and 22 can make representations to Clifford Chance as regard to the 2.3 Scheme documents, including the explanatory statement. I 2.4 have asked that a message has got out to all the creditors

instructions to the company not to share information with

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that they can ask Clifford Chance for information, insofar

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as they do not have it already. I think that is probably
    the best that can be done at this stage, and bearing in mind
 3
     there are only two days now before the proposed reconvened
 4
    hearing. If anyone else has any specific request to make as
 5
     regard to what happens between now and then that is not what
 6
     I have just set out, please make that now. Mr Bompas.
 7
         MR BOMPAS: Now, what I want to be clear about is that
 8
     we can communicate freely with the company and its
 9
     solicitors about the way forward into the Scheme meeting or
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     meetings?
         MRS JUSTICE BACON: Well, that must follow from the
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12
     discussions that have been held.
13
          MR BOMPAS: Yes, well, I hope so, but I was just a bit
14
     surprised at what was submitted.
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         MRS JUSTICE BACON: All right. All right, thank you
16
     very much, everyone.
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     (5.01 p.m.)
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